In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
PIERRE GRIMAUD AND J. P. CARAJOUS. } No. 241.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ANTONIO INDA. } No. 242.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

I.

Congress has power to enact legislation for the protection of its public lands, and, if it deems advisable, has the power to enact criminal laws to prevent trespasses thereon.

This principle is so obvious and well settled that it hardly needs mentioning.

In *Camfield* v. *United States* (167 U. S., 518, 525) this court had before it a statute making it unlawful to erect or maintain inclosures of public lands, and action was brought in equity to compel the removal

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and abatement of a fence erected in such way as to inclose a large body of public lands, though the fence was actually located upon lands not belonging to the Government. After declaring the principle that the United States had the power to protect its lands, coextensive with any private individual, the court further said:

> Considering the obvious purposes of this structure, and the necessities of preventing the inclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon lands of a private individual. *The General Government doubtless has a power over its own property analagous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.* If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all inclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage. The inconvenience, or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of Government lands. While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public

> lands, *though it may thereby involve the exercise of what is ordinarily known as the police power*, so long as such power is directed solely to its protection. A different rule would place the public domain of the United States completely at the mercy of State legislation.

Such power necessarily belongs to the United States under article 4, section 3, clause 2, of the Constitution, which provides:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

By this clause of the Constitution express authority is vested in the United States, *in its sovereign capacity*, to make the needful rules and regulations respecting its property, and that regardless of the particular locality in which it may be situated. Each State, by its adoption, relinquished to the United States the power to deal with such property in such way as it might deem proper, though such property might, at the time, be located within the territory of a State.

In pursuance of this power, Congress has repeatedly passed acts, not only for the protection of its lands, but also of its personal property, as, for illustration, by act of Congress, it is made a felony to embezzle Government funds, regardless of where such embezzlement may take place.

II.

Under the decisions of this court, a violation of the regulations prescribed by the Secretary of Agriculture upon which and the statute authorizing its enactment this indictment is based, constituted an offense, and rendered the offender liable to punishment in accordance with the terms of the statute.

In view of the earnest and able supplemental brief filed by defendant in error, a more extensive review of the decisions of this court bearing upon the question than appears in the brief filed at the last term by the late Solicitor General is believed to be justified.

It is respectfully insisted that there is not a decision of this court, when properly analyzed, which sustains the position contended for on behalf of defendant in error.

In *United States* v. *Bailey* (9 Pet., 238, 252, 254, 256, 257) the defendant was indicted under a statute making it an offense for one to swear falsely in support of any claim against the United States. There was evidence introduced on the trial tending to prove, among other things, that after the passage of an act entitled "An act to provide for liquidating and paying certain claims of the State of Virginia," the Secretary of the Treasury established regulations for the government of the department and its officers in their actions in connection with such claims, and under these regulations affidavits made and subscribed before justices of the peace in any of the States were

received and considered in proof of the claims; and that defendant made an oath in support of such a claim before a justice of the peace in Kentucky.

It is stated in the opinion of the court that "it is admitted that there is no statute of the United States which expressly authorizes any justice of the peace of a State, or indeed any officer of the National Government, judicial or otherwise, to administer an oath in support of any claim against the United States under the act of 1832, chapter 173. And the question is, whether, under these circumstances, the oath actually administered in this case was an oath upon which there would be a false swearing, within the true intent and meaning of the act of 1823, chapter 165." The third section of the act mentioned provided:

> That the Secretary of the Treasury be, and he is hereby, directed and required to adjust and settle those claims for half pay of the officers of the aforesaid regiment and corps which have not been paid, etc.

And it was under this very general statute that the regulations in question were adopted.

The court held that:

> The false swearing and false affirmation referred to in the act ought to be construed to include all cases of swearing and affirmation *required by the practice of the department*, in regard to the expenditure of public money, or in support of any claims against the United States.

And further said:

> Upon the whole, we are of opinion that where the oath is taken before a State or national magistrate authorized to administer oaths, *in pursuance of any regulations prescribed by the Treasury Department*, or in conformity with the practice and usage of the Treasury Department, so that the affidavit would be admissible evidence at the department, in support of any claim against the United States, and the party swears falsely, the case is within the purview of the act of 1823, chapter 165.

There is, of course, a distinction between the facts of that case and the present one, but the principle involved was precisely the same.

Congress there had enacted a general law against false swearing, but had enacted no law declaring it an offense under that statute to make a false affidavit before a justice of the peace of a State, in support of a claim against the United States under the act authorizing the liquidation of the Virginia claims. The Secretary of the Treasury, however, had promulgated a regulation making such affidavits admissible in the adjustment of these claims, *and it was by virtue of that regulation that the making of this affidavit became an offense.* If resort had been had to the act alone, there was nothing appearing therein making the swearing to the affidavit an offense; *and before the promulgation of the regulation, it was not an offense,* and it was necessary in describing the offense in the indictment to allege that such regulation existed and that the affidavit had been made in pursuance thereof.

The vital principle there held was, that a certain act upon the part of a person became a criminal offense in consequence and by virtue of a regulation adopted by the Secretary of the Treasury, and that the Secretary's action in adopting such regulation was essential to the existence of the offense.

A similar case is that of *Caha* v. *United States* (152 U. S., 211, 218). Caha was indicted for perjury committed in the land office at Kingfisher, Okla., in falsely testifying that he was on a sand bar in the South Canadian River at 12 o'clock noon, on the 22d of April, 1889, which testimony was given in a contest pending in the land office under a regulation of the Interior Department. After reviewing the various statutes relating thereto, the court said:

> We have therefore a general grant of authority to the Land Department to prescribe appropriate regulations for the disposition of the public land; a specific act of Congress authorizing contests before the local land offices in cases of preemption; *rules and regulations prescribed by the Land Department for contests in all cases of the disposition of public lands, including both preemption and homestead entries;* and the frequent recognition by acts of Congress of such contests in respect to homestead entries. Clearly, then, within the scope of section 5392, the local land officers in hearing and deciding upon a contest with respect to a homestead entry constituted a competent tribunal, and the contest so pending before them was a case in which the laws of the United States authorized an oath to be administered.

Here, again, was an offense committed which depended for its existence upon regulations adopted by an executive department under a general statute, and which would not have been an offense had not the oath in question been recognized and authorized under those regulations.

It is true that Mr. Justice Brewer, in drawing a distinction between that case and the case of *United States* v. *Eaton* (144 U. S., 677), said:

> This, it will be observed, is very different from the case at bar, where no violation is charged of any regulation made by the department. All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, at which the defendant committed the crime of perjury in violation of section 5392.

But it is submitted there can be no difference in principle between a department's creating one essential element of an offense and its creation of another essential element; and, moreover, in the subsequent case of *In re Kollock* (165 U. S., 526) the conviction was based upon the violation of a regulation of a department. This expression, of course, was mere *dictum*, and had no material bearing upon the decision of the case.

The case of *United States* v. *Eaton* (144 U. S., 677, 688) is cited and relied upon by defendant in error; but it is, in fact, weighty authority in support of the contention of the United States. The defendant Eaton was prosecuted for violating a regulation

adopted by the Secretary of the Treasury to carry into effect an act of Congress relating to the manufacture and sale of oleomargarine, the specific offense charged being that the regulation required certain books to be kept, which defendant unlawfully failed to do. The act authorized the Secretary of the Treasury to make proper rules and regulations for the enforcement of the act, and section 18, among other things, provided that if any manufacturer or dealer in oleomargarine should knowingly or willfully omit, neglect, or refuse to do, or cause to be done, "*any of the things required by law* in the carrying on or conducting of his business" he should pay a penalty of $1,000.

This court based its decision *entirely* upon the fact that the statute did not in specific terms make the violation of a *regulation* adopted by the Secretary an offense. This clearly appears from the following language of the court:

> It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. *If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in section 41 of the act of October 1, 1890.*
>
> Regulations prescribed by the President and by the heads of departments, under authority

> granted by Congress, may be regulations prescribed by law, so as to lawfully support acts done under them and in accordance with them and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing required by law as to make the neglect to do a thing a criminal offense in a citizen, *where a statute does not distinctly make the neglect in question a criminal offense.*

This language clearly shows that it was then the opinion of this court that, if the statute had specifically made a violation of the regulations adopted by the Secretary an offense, the action would have been maintainable; and therein lies the distinction between that and the present case, as here the statute does in the most explicit terms declare that the violation of the regulations to be adopted by the Secretary of Agriculture shall be a misdemeanor. Consequently, the principle there declared by the court is directly in point, and supports the contention of the United States in the present case.

In re Kollock (165 U. S., 526, 533) conclusively confirms the view expressed in the Eaton case. Kollock was indicted under another section of the same statute. The parts of the statute essential in that case, and the point presented, and the conclusion of the court thereon, were thus stated by Mr. Chief Justice Fuller in delivering the opinion of the court:

> By the terms of the act manufacturers of oleomargarine are required to pack it in wooden packages "*marked, stamped, and*

branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe;" and all sales by manufacturers and wholesale dealers must be in "original stamped packages." Retail dealers are required to "pack the oleomargarine sold by them in suitable wooden or paper packages, *which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe.*" And fine and imprisonment are denounced on "every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form *than in new wooden or paper packages as above described, or who packs in any packages any oleomargarine in any manner contrary to law, or who falsely brands any package* or affixes a stamp on any package denoting a less amount of tax than that required by law."

Kollock was convicted as a retail dealer in oleomargarine of knowingly selling and delivering one-half pound of that commodity *which was not packed in a wooden or paper package bearing thereon any or either of the marks or characters provided for by the regulations and set forth in the indictment.* It is conceded that the stamps, marks, and brands were prescribed by the regulations, and it is not denied that Kollock had the knowledge, or the means of knowledge, of such stamps, marks, and brands. *But it is argued that the statute is invalid, because it "does not define what act done or omitted to be done shall constitute a criminal offense," and delegates the power "to determine what acts shall*

be criminal" by leaving the stamps, marks, and brands to be defined by the commissioner.

We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution. But here the law required the packages to be marked and branded; prohibited the sale of packages that were not; and prescribed the punishment for sales in violation of its provisions; while the regulations simply described the particular marks, stamps, and brands to be used. The criminal offense is fully and completely defined by the act, and the designation by the commissioner of the particular marks and brands to be used was a mere matter of detail. The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offense.

Here, like in the other cases above cited, the language of the statute was of itself wholly insufficient to create the offense, there being nothing therein which indicated that it was illegal to sell a package branded as the package sold by Kollock was branded; and it was necessary, before one could know whether he was guilty of an offense in selling oleomargarine so branded, for him to resort to and read the requirements of the regulations of the Commissioner of Internal Revenue. *Moreover, the sale of oleomargarine in the manner in which it was sold by Kollock*

was not an offense upon the enactment of the statute, and did not become so until the particular regulation violated was adopted.

A case which, if possible, is more directly in point is that of *United States* v. *Breen* (40 Fed., 402), which was decided by Mr. Justice Lamar while on the circuit, the decision being concurred in by Judge Pardee. By act of Congress the Secretary of War was authorized to make such rules and regulations as might be necessary to protect the improvements then being made on the South Pass of the Mississippi River, and to prevent any obstructions to the Pass or injury to the work then being done by the Government. The act further provided that any violation of the *rules and regulations* so made should constitute a misdemeanor against the United States, and that upon conviction the offender should pay a fine not exceeding $500 and be imprisoned not exceeding six months, at the discretion of the court.

The Secretary of War had adopted a regulation by which steam vessels navigating the South Pass were required to reduce their speed to not exceeding 10 miles per hour, and from the pilot's station at Pica-yune Bayou to the sea end of the jetties the speed should not exceed 6 miles per hour; and defendant was indicted for violating this regulation. To the indictment a demurrer was filed; and the learned justice, in disposing of the case, said:

> If the law empowered the Secretary of War by rule or regulation to make a certain act criminal, and punishable as such, then this

prosecution would not be maintainable; but it is not the rule and regulation which declares the violation thereof a crime, and punishable. All that the Secretary is authorized to do is to make the rule and regulation. It is the act of Congress which declares that the unlawful and willful violation of such rule and regulation, after it is promulgated, shall be held a misdemeanor by the person violating the same, and that such person shall be sentenced to pay a fine not exceeding $500, and shall suffer imprisonment not exceeding six months, as a penalty therefor. Numerous acts of Congress have been passed authorizing the Postmaster General, and other members of the executive department, to make rules and regulations for the business pertaining to their respective departments, and declaring that, when made and promulgated, a willful and unlawful violation of them should be held a crime against the United States, and the violators punished as prescribed in the act. The Supreme Court of the United States is authorized by act of Congress to adopt certain rules for the government of the inferior courts, which when made have the force and effect of law as much as if such rules were directly enacted by Congress and approved by the President. The same effect is to be given to the rule and regulation made by the Secretary in this case. The act of Congress denounces the violation of it as a crime, and prescribes the penalty. The criminality of the violation of the rule, and the liability of the offender to indictment and to punishment upon trial and conviction, result directly and exclusively from the legislation of Congress.

This language of the court is just as applicable to the present case as to that one. In fact, there can be no distinction whatever in principle between the two cases.

The defense in each of the above cases was based upon the alleged principle that in enacting a criminal law Congress must itself define and describe *all the essential ingredients of the offense.* But in each this theory was rejected, and it was held that it is essential only that Congress declare the offense, but that it may delegate to a proper officer, in the performance of his official duties, the power to prescribe certain elements which shall enter into the offense.

To hold that a violation of the regulation in question was not a criminal offense, when its adoption by the Secretary of Agriculture was specifically authorized, and the violation of which, when adopted, was by express language of the statute declared an offense, would be far-reaching in its effect and most disastrous to the public welfare; as it is absolutely impossible for Congress to enter into detail as to the method of enforcing many of its most important and beneficent laws; and such details must be intrusted to the sound discretion of the heads of its departments, who are able to adjust those details to varying conditions as they arise; and it is apparent that the enforcement of regulations of this character is practically impossible without a penalty attached to their violation.

St. Louis, Iron Mt., etc., Ry. v. *Taylor* (210 U. S., 281) also sustains the principle here contended for.

There a civil action was maintained upon the violation of a rule established on a finding of the American Railway Association as to the standard height of drawbars. While that was a civil action yet the principle is the same, as Congress can no more delegate power to create civil liability than it can to create a criminal offense.

III.

The act of Congress under which the Secretary of Agriculture promulgated the regulation in question did not involve an improper attempt to delegate legislative power to an administrative officer.

(1) In the first place, it is impossible to arrive at a clear definition of legislative and executive power in accordance with which specific powers, which it is desirable should be exercised, may be unquestionably denominated as legislative or executive. In the second, it is inexpedient.

As it was said in *Brown* v. *Turner* (70 N. C., 93, 102), while—

> the executive, legislative, and supreme judicial powers of the Government ought to be forever separate and distinct, it is also true that the science of government is a practical one; therefore while each should firmly maintain the essential powers belonging to it, it can not be forgotten that the three coordinate parts constitute one brotherhood, whose common trust requires a mutual toleration of what seems to be a "common cause of vicinage" bordering on the domains of each.

So far as this necessarily vague definition of powers has been possible, it has been recognized by this court as follows:

> The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first can not be done; to the latter no objection can be made. (*Union Bridge Co.* v. *United States*, 204 U. S., 364, 382–383.)

Applying that here, it is seen that not only has Congress itself fixed the general rule to which the department regulations must conform in that it has defined the fundamental end, that is, the protection and improvement of the forests on the reservation; it has also indicated the sort of means that are to be employed to those ends; for, after giving the authority to the Secretary, it has enacted that "he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, *to regulate their occupancy and use*, and to preserve the forests thereon from destruction." Regulation 45 is very clearly within the terms of this limitation; indeed it would be difficult to conceive of a regulation looking to the "occupancy and use" of the reservation more accurately conforming to this direction of Congress. And it has been pointed out in the main brief prepared by the late Solicitor General how the regulation serves the other direction

laid down by Congress, "to preserve the forests thereon from destruction" (p. 32).

The promulgation of regulation 45 therefore is but the exercise of an authority or discretion as to the *execution* of the act of 1897, and it is clearly done in pursuance of that act, within the above definition.

Or, as it was put by the Circuit Court of Appeals, Ninth Circuit, in the *Dastervignes Case* (122 Fed. 30, 34):

> The Secretary, by adopting this rule, acted simply as the arm that carries out the legislative will. He did not make any law, but he exercised the authority given to him and made rules to preserve the forests on the reservations from destruction. Such rules, within constitutional limits, have the force and effect of law, and it is the duty of courts to protect and enforce them in order to uphold the law as enacted by Congress. As was said by the court in Locke's appeal (72 P., 491, 499; 13 Am. Rep., 716):
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> "To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the halls of legislation."

These principles governing the limitations on legislative and executive power have been recognized by this court in many cases, notably in *In re Kollock*, *Buttfield* v. *Stranahan*, and the *Union Bridge Co.'s case*, supra.

West v. *Hitchcock* (205 U. S., 80) also has a bearing here. The question was as to an allotment from the lands of the Wichita Band of Indians under the act of March 2, 1895, ch. 188, and there was involved in the decision a ruling by the Secretary of the Interior that the claimant was not a member by adoption of this band of Indians. It was contended that the Secretary had no power to make this ruling, and that even if he did it was subject to review. The ruling in question was made under a regulation of the Department of the Interior, which in turn was issued in pursuance of sections 441 and 463 of the Revised Statutes. Section 463 reads as follows:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of the Indian relations.

Mr. Justice Holmes, in delivering the opinion of the court, said on this point:

> We are disposed to think that authority was conferred by the general words of the statutes. * * * We should hesitate a good deal, especially in view of the long-established practice of the department, before saying that this language was not broad enough to warrant a regulation obviously made for the welfare of the rather helpless people concerned. The power of Congress is not doubted. The Indians have been treated as wards of the Nation. Some such supervision was neces-

> sary, and has been exercised. In the absence of special provisions naturally it would be exercised by the Indian Department.

The result was that mandamus to the Secretary was denied the petitioner and his selection remained unapproved; that is to say, his rights were made dependent on *an executive regulation concerning adoption into an Indian tribe* and *promulgated in pursuance of the extremely broad language of the above-quoted section of the Revised Statutes.*

The cases upholding orders made by the Interstate Commerce Commission under very general definitions of authority from Congress are in point. For instance, the commission is given authority to establish rates that shall be "just and reasonable." The establishment of a rate is, of course, very different from the mere finding of a fact; in reality, a rule of action is set up to govern carriers in the future. Yet the only direction or limitation of discretion which Congress has placed upon the commission is that the rate shall be "just and reasonable." Surely this is as wide as the so-called delegation involved in the present case. And it is to be observed that a deviation by a carrier from the rate imposed by the commission may involve a criminal punishment. This power of the commission has been recognized so late as in the case of *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railroad* (218 U. S., 88). Compare also the opinion of Mr. Justice Woods, sitting on circuit, in *Tilley* v. *Savannah, etc., R. Co.* (5 Fed., 641), and of Mr. Justice Brewer,

on circuit, in *Chicago, etc., Ry. Co.* v. *Dey* (35 Fed., 866).

Even more striking is the delegation involved in the power of the commission to establish general regulations for carriers. *Interstate Commerce Commission* v. *Illinois Central Railroad Co.* (215 U. S., 452) held that the commission has power to issue an order regulating the distribution of cars by railroad companies, and yet the only direction or rule given by Congress to the commission under which this regulation could have been issued was "to determine and prescribe * * * what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier * * * shall conform to the regulation or practice so prescribed." Can such a delegation be upheld and that in the present case condemned?

Nor can there be any defense based on the unqualified point that criminal sanction can not in any event be given to an administrative rule, for, as heretofore pointed out, that question is really settled by a number of cases in this court. (See also *Willoughby, The Constitution*, sec. 781.)

But it may be profitable to look at the case from the angle suggested by the above contention and examine closely in its relation to law the physical act that is the subject of this indictment. It consisted in entering on the Sierra Forest Reserve with sheep and permitting them to graze. Of course the fact

that this was without a permit is but one of the factors in relating the physical act to law.

Such an act was unlawful irrespective entirely of regulation 45 or of any other rule of the department. It was an entry and trespass on the lands of the United States. (*Camfield* v. *United States, supra.*)

It is true the court said in *Buford* v. *Houtz* (133 U. S., 320, 326):

> We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and uninclosed, and no act of government forbids this use.

But the lands included in a forest reservation are no longer public lands within the purport of that doctrine, and the very law originally creating this forest reservation—entirely apart from the act now in question—is an "act of government" that "forbids this use." The creation of such a reservation severs the land from the public domain and appropriates it to a public use. (*Wilcox* v. *McConnel*, 13 Pet., 496, 512, 513.)

Laying aside other provisions of law, the defendants, therefore, were clearly guilty of a trespass and their only defense to that charge of unlawfulness must be predicated on later acts of Congress which granted certain privileges to use these reservations. But they can not bring themselves within

any of the classes of persons to whom such privileges were granted. They are not among any of those enumerated in the act of 1897 here in question. (See main brief, pp. 2–7.)

Then, to return to regulation 45, and applying even the narrow test proposed in *United States* v. *Moody* (164 Fed., 269), where it was said the controlling question is, have the rules adopted by the Secretary attempted to make unlawful that which, but for such rules, would have been lawful, it is clear no such attempt has here been made.

Regulation 45 is simply a regulation of the "occupancy and use" of the reservation, and, Congress, in making its violation a crime, is doing no more than saying that what was unlawful before under acts of Congress is now a criminal offense.

It is important to remember that in dealing with this subject of public forest lands and reservations we are dealing with a subject over which Congress has a much more exclusive power of control, and therefore a wider range of choice of means in the exercise of that power, than it has in respect to its more general functions under the Constitution. This principle has been recognized by this court in many instances. Thus, in respect to the question of immigration and the admission of aliens the theory has been that Congress has an almost exclusive power, and the cases go very far to show that any means selected by Congress in the exercise of that power will not be questioned. A long line of cases involving the exclusion of Chinese aliens by administrative

action under very broad authority from Congress attests to this. The recent case of *Oceanic Navigation Co.* v. *Stranahan* (214 U. S., 320) has a strong bearing on this principle. The consideration that led the court to sanction the action of Congress and of the Secretary in that case, namely, the exclusive control of Congress over the subject-matter in question, must lead to a recognition of the validity of the action of Congress in this.

Another instance is the power of the Secretary of War to prescribe rules and regulations for the government of the Army and the like authority of the Secretary of the Navy over his department. These rules have been sustained as having the force of law.

Ex parte Reed, 100 U. S., 13.
Smith v. *Whitney*, 116 U. S., 167.

In *Ex parte Reed* an officer of the Navy was found guilty by a court-martial of certain charges founded on a breach of regulations issued by the Secretary of the Navy and was sentenced to fine and imprisonment. This was sustained by this court.

This reservation is a sort of "private" governmental property, established for a governmental enterprise and in pursuance of a law passed in the exercise of a governmental function; it is like a public building—is like, for instance, a department building here at the seat of government. Regulation 45 is not, therefore, to be confounded with a law passed in the exercise of a direct and explicit function of Congress under the Constitution; it is rather to be brought into comparison with a rule issued in conformity with

an act of Congress by the Secretary for the protection of his own department building. If, for example, Congress had provided in general terms that the Secretary should establish regulations for the use of the building, and a person—let him be a private citizen not connected with the department staff—were arrested for breaking and entering, might not his guilt depend on whether or not he was there, and doing what he was, within the hours fixed by the Secretary for the use of the building, or with a permit from the Secretary to do the thing, or was acting in conformity with any other conceivable regulation of the Secretary?

See also on the general question *Cosmos Co.* v. *Gray Eagle Co.* (190 U. S., 301, 309), to the effect that the Land Department has power under Revised Statutes, sections 441, 453, 2478, to adopt regulations for the administration of the forest reserve act.

And see *Butte City Water Co.* v. *Baker* (196 U. S., 119, 125, 126), upholding the delegation by Congress of power to local legislatures to make rules and regulations for the disposal of mineral lands. Mr. Justice Brewer, speaking for the court, said:

> What is the ground upon which the validity of these supplementary regulations prescribed by a State is challenged? It is insisted that the disposal of the public lands is an act of legislative power, and that it is not within the competency of a legislature to delegate to another body the exercise of its power; that Congress alone has the right to dispose of the public lands, and can not transfer its authority

to any State legislature or other body. The authority of Congress over the public lands is granted by section 3, Article IV, of the Constitution, which provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In other words, Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of. The Nation is an owner, and has made Congress the principal agent to dispose of its property. It is inconceivable that Congress, having regard to the interests of this owner, shall, after prescribing the main and substantial conditions of disposal, believe that those interests will be subserved if minor and subordinate regulations are intrusted to the inhabitants of the mining district or State in which the particular lands are situated. While the disposition of these lands is provided for by congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in the highest sense of the term, and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully intrust to the local legislature the determination of minor matters respecting the disposal of these lands (pp. 125, 126).

Roughton v. *Knight*, October term, 1910, No. 711, February 20, 1911.

IV.

The general theory of government that there should be no union between the several departments has no application to this case.

After citing the views of notable philosophers and statesmen with reference to the theory mentioned, learned counsel for defendant say:

> One can not hear the voices of these great founders echoing down through the history of our Republic without being impressed with the belief that they never intended that Congress, the creature of their work, should violate those principles by vesting in the same person the power of promulgating and also of executing a law.

This sounds well, but has no application to the statute under consideration, because the power to create an offense or to lay down a rule of conduct, the violation of which shall constitute an offense, and the power to punish that offense when committed, is not by this statute vested in the same individual or department of government. The Secretary of Agriculture has absolutely no power to adjudge who is guilty of violating his regulations, or to impose a penalty for its violation. Such a question must be submitted in the proper form, as has been done here, to a regularly constituted court, and it be by such court determined, after a deliberate and careful hearing, whether the charge preferred is sustained by proper evidence; and if the defendant be proven guilty as required by law, it is within the province of

the court to impose a penalty, and of the regularly constituted officials to see that the judgment of the court is executed.

The same criticism could equally well have been made of the statute involved in *Union Bridge Co.* v. *United States* (204 U. S., 364). Congress by act of March 3, 1899, vested the Secretary of War with authority, after giving proper notice, to determine whether or not any parties were obstructing the navigability of waterways of the United States, and if the Secretary should determine that such obstruction existed, and should direct its removal, it was made a misdemeanor not to comply therewith. It was insisted that this act was void because it undertook to vest power in the Secretary which could not be delegated by Congress; but this court, after a most careful consideration and exhaustive review of authorities, held that Congress could vest in the Secretary the power to perform the duties prescribed in that act.

That act, if the expression is applicable to an act of this character at all, is more obnoxious than the one involved, because there the Secretary of War is empowered, not to lay down a general rule as to the obstruction of navigable waters, but to determine in each particular case whether the navigability of the water is or is not obstructed, and to lay down a rule or make a decision with reference to a particular individual, the violation of which by such individual constitutes a misdemeanor. Of course, the reading

of that act revealed nothing to the Union Bridge Co., as to whether or not it had committed the offense for which it was indicted, as the offense consisted entirely in disregarding the finding of the Secretary and the order based thereon, which was not a general rule of conduct, but was applicable to that company alone.

An act which apparently could with greater justice be criticized for concentration of power, was the provision of the immigration act of March 3, 1903 (32 Stat., 1213, ch. 1012), which was passed upon by this court in *Oceanic Navigation Co.* v. *Stranahan* (214 U. S., 320, 332). By section 9 of that act, after making it unlawful for any person to bring into the United States any alien inflicted with a loathsome or contagious disease, it was provided that—

> if it shall appear to the satisfaction of the Secretary of the Treasury (Secretary of Commerce and Labor) that any alien so brought to the United States was afflicted with such a disease at the time of foreign embarkation, and that the existence of such disease might have been detected by means of a competent medical examination at such time, such person or transportation company (bringing in such alien) shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of one hundred dollars for each and every violation of the provisions of this section, and no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid, nor shall such fine be remitted.

It was stated in the beginning of the opinion of the court, which was delivered by Mr. Justice (now Mr. Chief Justice) White, that the steamship company had paid the money under protest and involuntarily, because it was the only means by which it could obtain the vessel's clearance papers, and that the failure of the vessel to depart on time would have caused grave public inconvenience from the nonfulfillment of mail contracts, and would have entailed upon the company serious pecuniary loss consequent to the failure to carry out many other contracts.

There was a statute which vested in the head of a department the judicial power of determining whether or not the provisions of the act had been violated, and in a subordinate of that department the executive power of enforcing the collection of the penalty, and, like the act sustained in the *Union Bridge Co. case*, the decision of that officer related to a single transaction by one individual, and was not a general rule for the guidance of the public; yet this court held that this provision was valid.

V.

The fact that the Secretary has the power to change the regulations in question, and has from time to time had in force regulations different in some respects to the present one, does not render the act of Congress invalid.

Learned counsel, upon pages 53 and 54 of their brief, point out the particulars in which this regulation has been from time to time changed, and argue therefrom that it is improper that such authority

be vested in an official, as it renders it difficult for one to inform himself as to what the exact status of the law is.

Precisely the same argument would apply to each of the cases above cited. In the Kollock case the Commissioner of Internal Revenue and the Secretary of the Treasury, if they had seen proper, could have daily changed the regulations with reference to branding oleomargarine, and in all probability many changes therein were made. In the Bailey case the Secretary of the Treasury could have changed any number of times the regulations with reference to the State officers before whom affidavits of the character there in question could be made. Likewise, in the *Union Bridge Co. case*, after the Secretary of War had declared that a party was obstructing navigation, he might have reversed his ruling, and that which was theretofore an offense would no longer have been such.

It is a misconception, however, that the rule of law is not continuous. While certain ingredients which constitute the offense may be changed from time to time, yet the statute declares the offense to consist in violating the regulations adopted by the Secretary, and that declaration of the statute remains always the same.

Nor is there any merit in the claim that the defendant can not conveniently inform himself as to the status of the law. Such regulations are published and are continually kept on file in the Department of

Agriculture, and anyone may, when he sees proper, inform himself with reference thereto; and this can be done about as easily as one can search the Revised Statutes and determine therefrom what the law is upon any particular subject.

Moreover, one can easily avoid the violation of this statute by letting the Government's property alone. Private individuals have no vested rights in the lands of the United States, nor have they any legal right to make any use of them. All trouble can be avoided by recognizing the fact that these lands belong to the United States and by treating them just as the lands of any private individual would be treated; that is, by not trespassing thereon until permission is obtained from the proper authorities.

VI.

The Government's contention is sustained by the weight of authority among the lower United States courts.

(1) In addition to the cases cited in the main brief (p. 38) as upholding the validity of the Secretary's regulation for civil purposes there may be cited:

Shannon v. *United States*, (160 Fed., 870; C. C. A., 9th Circ., opinion by Judge Gilbert).

And the following have supported indictments for violations of the regulation:

United States v. *Rizzinelli* (182 Fed. 675; Dist. Ct., Idaho, Judge Dietrich).

Dent v. *United States* (8 Ariz. 413), decided on the authority of the Dastervignes case, and on the impres-

sion that that case went on the theory that its holding was applicable equally to criminal and to civil cases. (Opinion by Kent, C. J.)

(2) It is also worth while to consider the decisions in the lower Federal courts sustaining convictions of crime, and basing civil causes of action, on other statutes, and executive rules promulgated thereunder, in no wise distinguishable from those here attacked. Among those are:

United States v. *Reder* (69 Fed. 965; Dist. Ct., S. Dak., Judge Edgerton). This was an indictment for cutting timber from the mineral lands of the United States contrary to the provisions of the act of June 3, 1878, chapter 150, and of a regulation issued in pursuance of that Act by the Secretary of the Interior. The act authorizes certain classes of persons to cut timber on the mineral lands of the United States in certain States and Territories for purposes of building, agriculture, and mining, "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes." And the third section provided that:

> Any person or persons who shall violate the provisions of this act, or any rules or regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, etc.

The regulation issued by the Secretary for the violation of which the defendant was indicted provided that no person should sell timber cut from the min-

eral lands of the United States without taking from the purchaser a statement in writing as to purposes for which the same was intended to be used. It was held that the defendant was guilty of a misdemeanor.

United States v. *Williams* (6 Mont., 379; opinion by McLeary, J.). This was an action brought by the United States to recover the value of certain wood cut on public lands in violation of the act of June 3, 1878, chapter 150 (20 Stat. L., 88), just considered, and of a regulation issued thereunder. The cutting in question violated a regulation that trees cut should not be less than 8 inches in diameter. It was argued by the defendant that the act of Congress, in so far as it authorized the Secretary of the Interior to make rules and regulations, was unconstitutional. The court, however, held the act and regulation to be valid, and overruled the court below in sustaining a demurrer to the complaint.

United States v. *Price Trading Company* (109 Fed., 239; C. C. A., 8th Circ.; opinion by Judge Thayer). This case also involved the validity of a regulation of the Department of the Interior promulgated in pursuance of the same authority as in the two preceding cases, namely, the act of June 3, 1878, chapter 150. The regulation was as follows:

> (4) Every owner or manager of a sawmill, or other person felling or removing timber under the provisions of this act, shall keep a record of all timber so cut or removed, stating time when cut, names of parties cutting the

same or in charge of the work, and describing the land from whence cut by legal subdivisions if surveyed, and as near as practicable if not surveyed, with a statement of the evidence upon which it is claimed that the land is mineral in character, and stating also the kind and quantity of lumber manufactured therefrom, together with the names of parties to whom any such timber or lumber is sold, dates of sale, and the purpose for which sold, and shall not sell or dispose of such timber, or lumber made from such timber, without taking from the purchaser a written agreement that the same shall not be used except for building, agricultural, mining, or other domestic purposes within the State or Territory; and every such purchaser shall further be required to file with said owner or manager a certificate, under oath, that he purchases such timber or lumber exclusively for his own use and for the purposes aforesaid.

(5) The books, files, and records of all millmen or other persons so cutting, removing, and selling such timber or lumber, required to be kept as above mentioned, shall at all times be subject to the inspection of the officers and agents of this department.

(6) Timber felled or removed shall be strictly limited to building, agricultural, mining, and other domestic purposes within the State or Territory where it grew.

The court recognized that this was a valid regulation under an authority validly conferred by Congress, and sustained the action on it.

United States v. *Ormsbee* (74 Fed., 207; Dist. Ct., E. D. Wis., Judge Seaman), section 4 of the act of August 17, 1894, chapter 295, provided as follows:

> That it shall be the duty of the Secretary of War to prescribe such rules and regulations for the use, administration, and navigation of any and all canals and similar works of navigation that now are or that hereafter may be owned, operated, or maintained by the United States as in his judgment public necessity may require. Such rules and regulations shall be posted in conspicuous and appropriate places for the information of the public; and every person and every corporation which shall knowingly and willfully violate such rules and regulations shall be deemed guilty of a misdemeanor, and on conviction thereof in any district court of the United States within whose territorial jurisdiction such offense may have been committed, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment (in case of a natural person) not exceeding six months, in the discretion of the court.

The regulation on which the indictment here was founded forbade any persons from drawing water from the locks and canals of the Fox River. It was held that there was involved no delegation of legislative power, and that the rules made by the Secretary, pursuant to the act, had the force of law, so that persons violating them were subject to criminal punishment under the provisions of the act. The court said:

If either this act of Congress which directs that "rules and regulations for the use, administration, and navigation" of the canals and works of navigation "owned, operated, or maintained by the United States" be prescribed by the Secretary of War, or the regulations referred to as adopted thereupon imposed the requirement or restraint of action or conduct which would be lawful but for the attempted legislation, there would be occasion for the inquiry whether the legislative will had been distinctly exercised and pronounced, in some general provision at least, either in this or some cognate enactment; and it would then become necessary to consider the distinctions as to delegation of power, for which the defendant contends, as pointed out in *Field* v. *Clark* (143 U. S., 649, 693, 12 Sup. Ct., 495), and the authorities there approved, namely, that "the legislature can not delegate its power to make the law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." (Locke's Appeal, 72 Pa. St., 491.) Here, however, the indictment alleges an offense committed by "knowingly and willfully drawing water" from a canal "then and there owned, operated, and maintained by the said United States," and thereby lowering the water surface below the crest of the dam, an interference with the property and proprietary rights of the Government. Presumptively, compensation has been rendered to all riparian owners, and all rights in and control of the waters of the canal are vested in the

United States, and no persons can have use, either of water or works, except under permission, and subject to any regulations which may be imposed. Without such permission the use would constitute a trespass. In this case Congress provides that permission may be granted through rules and regulations to be adopted by the executive department having charge of the works. It is true that Congress might prescribe the rules, either in general terms or in detail, but they are clearly of administrative rather than legislative nature, and may be relegated entirely to any executive agency, either with or without direct provisions by Congress. The discretion which is conferred, having regard to the use and care of the property of the United States, seems to appertain to the executive department and to be of the class defined in *United States* v. *Eliason* (16 Pet., 291, 301). The regulations so made constitute the only permission for using the water, and without permission there can be no claim of right to use, I presume, even without declaration by Congress to that effect, but section 7 of the act of September 19, 1890, as amended by the act of July 13, 1892, clearly prohibits any use "unless approved and authorized by the Secretary of War." I am of opinion that regulations for the purpose stated in the indictment may be established by the Secretary of War, and that they have the "force of law" within those purposes when adopted and promulgated as directed by the act. (*Gratiot* v. *United States*, 4 How., 80, 117.) Therefore the motion to quash the indictment will be overruled.

United States v. *Moody* (164 Fed. 269; Dist. Ct., W. Mich., Judge Knappen). Here an indictment was sustained for a violation of a regulation issued by the Secretary of War in pursuance of the act of August 18, 1894, chapter 299, which made it the duty of the Secretary of War "to prescribe such rules and regulations for the use, administration, and navigation of any or all canals and similar works of navigation that now are or hereafter may be owned, operated, or maintained by the United States as in his judgment the public necessity may require," and made violation of such rules a misdemeanor punishable by fine and imprisonment.

The specific charge was that the defendant disobeyed a lawful order of an assistant superintendent to tie up a steamer at a certain point outside the canal gates. The regulations in question provided that:

> The movement of all vessels, boats, or other floating things in the canal shall be under the direction of the superintendent and his assistants, whose orders and instructions must be obeyed.
>
> No person shall cause or permit any vessel or boat of which he is in charge, or on which he is employed, to in any way obstruct the canal, or delay in passing through it, unless he is permitted to do so by the superintendent or one of the assistant superintendents of the canal.

Van Lear v. *Eisle* (126 Fed. 823; Circ. Ct., E. Ark., Judge Trieber). This was a civil action based on a

rule made by the Secretary of the Interior under the provisions of the act of March 3, 1891, chapter 533, relating to the Arkansas Hot Springs Reservation, by which power is vested in the Secretary to "make all necessary rules and regulations as to said bathhouses, and the service therein, as shall be deemed best for the public interest." The Secretary issued regulations as follows:

> Rule 9. No bathhouse supplied with hot water from the Hot Springs Reservation shall permit any person to bathe therein who is under medical treatment, unless the applicant for baths presents satisfactory evidence that he or she is the patient of a physician duly registered at the office of the superintendent of the Hot Springs Reservation as one qualified to prescribe the waters from the hot springs.
>
> Rule 10. Physicians desiring to prescribe the waters of the hot springs, either internally or through the medium of the baths, must first be registered at the office of the superintendent of the reservation. Registration will only be accorded such physicians as are found, by a board of physicians designated by the Secretary of the Interior, to have proper professional qualifications and character.

The court, while holding that the complainant was not bound by these regulations, did so, not on the ground that Congress could not delegate the power to make such regulations, but for the reason that Congress had not so delegated power. The court expressly said that the doctrine "that Congress can delegate the power to make rules and regulations

concerning the public domain, or other matters, is now no longer an open question."

United States v. *Slater* (123 Fed., 115; Dist. Ct., Nev., Judge Hawley.) Here a criminal information was sustained for a violation by the defendant of a regulation issued by the Department of Agriculture in pursuance of the act of May 29, 1884, prohibiting interstate transportation of live stock affected with a contagious disease.

Stratton v. *Oceanic Steamship Company* (140 Fed., 829; C. C. A., 9th Circ., opinion by Judge Hawley.) The act of March 3, 1903, chapter 1012, imposes a head tax on alien passengers entering the United States to be paid by the master or owner of the vessel, but provides that the tax shall not be levied upon aliens in transit through the United States. It also authorizes the Commissioner General of Immigration, under the direction of the Secretary of the Treasury, to establish "such rules and regulations, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this act and for protecting the United States and aliens migrating thereto from fraud and loss." The commissioner adopted a regulation to the effect that no alien desiring admission to the United States for the professed purpose of proceeding directly therefrom to foreign territory should be permitted to land except after the deposit with the collector of customs at the port, by the master or owner of the vessel, of the head tax of $2 for such alien, but that such amount should be

refunded upon proof satisfactory to the immigration officer that the alien had passed by direct and continuous journey through and out of the United States. The circuit court of appeals held this to be a valid regulation.

That there is nothing unusual in the broad terms of the act now in question conferring authority upon the Secretary of Agriculture to make regulations in respect to forest reservations may be seen by adverting to other instances in which Congress has conferred upon executive officers equally broad powers to be exercised in administering the laws relating to public lands. Among such laws are the following:

Act of June 3, 1878, chapter 150, 20 Statutes at Large, 88. This act authorizes citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes—

> subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes.

By section 3 it is provided that any person who shall violate its provisions—

> or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

Act of June 3, 1878, chapter 151, 20 Statutes at Large, 89. This act provides for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory. By section 3 it is provided that—

> effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

Act of March 3, 1891, chapter 561, as amended by the act of March 3, 1891, chapter 559, 26 Statutes at Large, 1093. This statute enacts that in certain States and Territories—

> * * * in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain: *Provided*, That the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be pre-

> scribed by such rules and regulations; but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands.

The act of October 1, 1890, chapter 1263, 26 Statutes at Large, 650. This is "An act to set apart certain tracts of land in the State of California as forest reservations." Section 2 provides as follows:

> That said reservation shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities, or wonders within said reservation, and their retention in their natural condition. The Secretary may, in his discretion, grant leases for building purposes, for terms not exceeding ten years, of small parcels of ground not exceeding five acres, at such places in said reservation as shall require the erection of buildings for the accommodation of visitors; all of the proceeds of said leases and other revenues that may be derived from any source connected with said reservation to be expended under his direction in the management of the same and the construction of roads and paths therein. He shall provide against the wanton destruction of the fish and game found within said reservation and against their capture or destruction for the purposes of merchandise or profit. He shall

> also cause all persons trespassing upon the same after the passage of this act to be removed therefrom, and, generally, shall be authorized to take all such measures as shall be necessary or proper to fully carry out the objects and purposes of this act.

Act of February 28, 1899, chapter 221, 30 Statutes at Large, 908. This is "An act to authorize the Secretary of the Interior to rent or lease certain portions of forest reserve." By section 1 it is provided—

> That the Secretary of the Interior be, and hereby is, authorized, under such rules and regulations as he from time to time may make, to rent or lease to responsible persons or corporations applying therefor suitable spaces and portions of ground near, or adjacent to, mineral, medicinal, or other springs, within any forest reserves established within the United States, or hereafter to be established, and where the public is accustomed or desires to frequent, for health or pleasure, for the purpose of erecting upon such leased ground sanitariums or hotels, to be opened for the reception of the public. And he is further authorized to make such regulations, for the convenience of people visiting such springs, with reference to spaces and locations, for the erection of tents or temporary dwelling houses to be erected or constructed for the use of those visiting such springs for health or pleasure. And the Secretary of the Interior is authorized to prescribe the terms and duration and the compensation to be paid for the privileges granted under the provisions of this act.

Section 2478 of the Revised Statutes reads as follows:

> The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title (i. e., "The public lands") not otherwise specially provided for.

For the foregoing reasons it is insisted that the judgment of the court below should be reversed, and the case be remanded for trial.

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Attorney.

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Office Supreme Court U. S.
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Nos. 241 & 242.

In the Supreme Court of the United States

OCTOBER TERM, 1910

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
PIERRE GRIMAUD, AND J. P. CARAJOUS.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
ANTONIO INDA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE DEFENDANTS IN ERROR

In the Supreme Court of the United States

OCTOBER TERM, 1910

THE UNITED STATES, PLAINTIFF IN ERROR,
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PIERRE GRIMAUD, AND J. P. CABAJOUS. } No. 241

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
ANTONIO INDA } No. 242

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE DEFENDANTS IN ERROR.

STATEMENT.

This is a writ of error sued out by the United States to the District Court of the United States for the Southern District of California, to review a judgment sustaining a demurrer interposed by the defendants, to indictments charging them with grazing sheep, without permission, in the Sierra Forest Reserve.

The United States prosecutes this writ of error upon the assumption that the decision of the District Court was based upon an erroneous construction of the statute upon whch the indictments were founded, and therefore, by virtue of the Act of March 2, 1907, Chap 2564, 34 Stat. at L. 1246, U. S. Comp. Stat. Supp. 1907, p. 209, the right obtained to review the decision by writ of error direct from this court.

The law under which the defendants were indicted is the Act of Congress, approved June 4, 1897, entitled "An Act making Appropriations for Sundry Civil Expenses of the Government for the year 1897, *and for other purposes.*" Act June 4, 1897, C. 2, Sec. 1, 30 Stat. 35, (U. S. Comp. St. 1901, p. 1540). In this act it is provided, among other things, that:

> "The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations, which may have been set aside, or which may be hereafter set aside, under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such regulation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act *or such rules and regulatons* shall be punished as is provided for in the Act of June fourth, eighteen hundred and eighty-eight, amending section fifty three hundred and eighty-eight of the Revised Statutes of the United States."

Section 5388, Rev. St., as amended by Act of June 4, 1888, C. 340, 25 Stat. 166, (U. S. Comp. St. 1901, p. 3649), provides:

> "Every person who unlawfully cuts, or aids or is employed in unlawfully cutting, or wantonly destroys or procures to be wantonly destroyed, any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation or lands

> belonging to or occupied by any tribe of Indians under authority of the United States, shall pay a fine of not more than $500 or be imprisoned not more than 12 months, or both, in the discretion of the court."

The jurisdiction of the Secretary of the Interior over forest reservations was subsequently transferred to the Secretary of Agriculture, and thereafter, on June 12, 1906, the latter official promulgated the following:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers and travelers, the milch or work animals not exceeding a total of six head owned by bona fide settlers residing in or near a forest reserve, which are excepted, and require no permit."

The demurrer to the indictment was interposed on the grounds that the Act of Congress of June 4, 1897, above mentioned, so far as it attaches a penalty to any of the rules and regulations thereafter to be made by the Secretary of the Interior, or his successor in authority, is void, because it does not completely or at all define the acts to be punished, and because it attempts a delegation of legislative power to an executive or administrative officer.

Points and Authorities

We hold the following propositions of law:

1. That the law under which the indictments were found is a void enactment under the Constitution of

the United States, for the reason that it does not sufficiently define, or define at all, what acts done or omitted to be done, within the supposed purview of the said act, shall constitute an offense or offenses against the United States.

State vs. Mann, 2 *Oregon*, 238-241.
State vs. Smith, 30 *La. Ann.* 846.
U. S. vs. Eaton, 144 *U. S.* 677, 36 *L. Ed.* 591.
U. S. v. Grimaud, 170 *Federal* 206.
Cook vs. State, (*Ind.*) 59 *N. E.* 489.
U. S. v. Reese, 2 *Otto*, 214-256, 23 *L. Ed.* 563.
Sarlls v. United States, 152 *U. S.* 571, 38 *L. Ed.* 556.
Todd v. United States, 158 *U. S.* 278, 39 *L. Ed.* 982.
Augustine v. State, (*Tex.*) 52 *S. W.* 80.
State vs. Partlow, 91 *N. C.* 550
McGuire v. District of Columbia, 65 *L. R. A.* 430.
Tozer v. United States, 52 *Fed. Rep.* 917.
Louisville & Nash. R. R. Co. v. Commonwealth, (*Ky*) 33 *L. R. A.* 209.
Drake vs. Drake, 4 *Dev.* 110.
Com. vs. Bank, 3 *Watts & S.* 173
4 *Blackstone Comm.* 5.
12 *Cyc.* 129.
Ex parte McNulty, 77 *Cal.* 164.
15 *Penal Code. Cal.*
Peters vs. U. S. 36 *C. C. A.* 105.

2. That the law under which the indictments were found is in violation of the Constitution and laws of the United States, for the reason that it is not within the power of Congress under the Constitution of the United States to delegate to the Secretary of the Inter-

ior or the Secretary of Agriculture of the United States or any other person, authority or power to determine what acts shall be criminal, and the act in question is a delegation of legislative power to an executive officer to define and establish what shall constitute the essential elements of a crime against the United States.

U. S. vs. Mathews, 146 *Fed. Rep.* 306.
U. S. vs. Maid, 166 *Fed. Rep.* 650.
U. S. vs. Blasingame, 166 *Fed. Rep.* 654.
U. S. vs. Eaton, 144 *U. S.* 677, 36 *L. Ed.* 594.
U. S. vs. Keokuk, & H. Bridge Co. 45 *Fed. Rep.* 178.
U. S. vs. Rider, 50 *Fed. Rep.* 106.
O'Neil v. American Fire Ins. Co. 166 *Pa.* 72, 30 *Atl.* 943.
State, ex rel. Adams v. Burdge, 95 *Wis.* 390, 37 *L. R. A.* 157.
Dowling vs. Lancashire Ins. Co. 92 *Wis.* 63, 65 *N. W.* 741.
Anderson v. Manchester Fire Ins. Co. 59 *Minn.* 182, 28 *L. R. A.* 609.
Ex parte Cox, 63 *Cal.* 21.
Harbor Com'r vs. Excelsior Redwood Co. 88 *Cal.* 491.
Schaezlein vs. Cabaniss, 135 *Cal.* 466.
Kilbourn vs. Thompson, 103 *U. S.* 168-191, 26 *L. Ed.* 378.
U. S. v. Wiltberger, 5 *Wheat.* 85, 5 *L. Ed.* 92.

ARGUMENT.

1.

That the law under which the indictment were found is a void enactment under the Constitution of the United States, for the reason that it does not sufficiently define, or define at all, what acts done or obmitted to be done, within the supposed purview of the said act, shall constitute an offense or offenses against the United States.

It will be observed that this statute under which the indictments in these cases were found confers plenary power upon an administrative officer to make any rule or regulation he shall deem fit to preserve the forest reserves of the United States, and attaches a heavy penal sanction to the violation of any of those rules or regulations, whatever their nature, and however innocent or innocuous the act itself might otherwise be. It is contended by the Government that this law is complete in itself, that it violates no constitutional limitation or legal principle known to the jurisprudence of the United States, and that it complies with the established rule "that crimes and offenses cognizable under the authority of the United States, are such, and only such, as are expressly designated by law."

While the general principle of statutory construction whereby it is announced that in examining an act of Congress every intendment will be made by the court in favor of its constitutionality is undisputed, nevertheless, as this law is penal in its nature it must be subjected to the strict rules of construction applied to all penal statutes. In 12 Cyc 129, the definition of a crime is as follows:

> "A crime is an act or omission which is prohibited by law as injurious to the public and punished by the state in a proceeding in its own name or in the name of the people or the sovereign."

Blackstone defines a crime in the following language:

> "A crime or misdemeanor is an act committed or omitted, in violation of a public law either forbidding or commanding it."

4 *Bl. Comm.* 5.

..The Penal Code of California defines a crime as follows:

> "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it and to which is annexed upon conviction either of the following punishments; death, imprisonment, fine, removal from office or disqualification to hold office."

15 *Penal Code. Cal.*

It will be observed that in each of the above definitions the thing committed or omitted is an *act.* The first and last definitions are divisible into two elements, the act commanded or forbidden and the punishment, and it has been held that the fixing of a punishment is as necessary to constitute a crime as the definitions of the act.

> *U. S. v. Eaton,* 144 *U. S.* 677, 36 *L. Ed.* 591.
> *People vs. McNulty,* 93 *Cal.* 427.

In the case of Ex parte McNulty, infra, the court, in holding that the legislature cannot delegate to a board of medical examiners the power of declaring what acts shall constitute a misdemeanor, said that,

> "Practicing after an order of the board revoking the certificate for unprofessional conduct is not declared to be a crime, and no penalty is attached to it. Respondent's position really is, that the legislature must have intended such conduct to be a criminal offense. It would be vain to inquire what intent lurked in the minds of the persons who happened to be members of the legislature when the act was passed. It certainly would be a forced thing to imagine their intent to be that a man should loose his

> liberty for the violation of any vague, undefined notion of unprofessional conduct, which might, after the fact, be entertained by certain individuals constituting a board of examiners. At all events, the question whether or not the conduct in question is made a crime must be determined from the language used in the statute, and we find there nothing that declares such conduct to be a criminal offense. Nor is there anything in what is left of the act of 1876 (although no reference is made to that act in the complaint), which makes the conduct ascribed to petitioner a crime. Constructive crimes—*crimes built up by courts with the aid of inference, implication and strained interpretation*— are repugnant to the spirit and letter of English and American criminal law."
>
> *Ex parte McNulty*, 77 *Cal.* 164.

In the case of State v. Mann, 2 Oregon, 238, 241, the court held as follows:

> "It is a well settled rule of law that no one can be punished for doing an act unless it clearly appears that the act sought to be punished comes clearly within both the letter and spirit of the law prohibiting it. *The act constituting the offense should be clearly and specially described in the statute and with sufficient certainty, at least, to enable the court to determine, from the words used in the statute, whether the act charged comes within the prohibition of the law.*"

Keeping in mind the definition above set forth requiring that in order to constitute a crime an act well defined by the statute must either be committed or omitted, and also observing the rule so clearly laid down in the last case above cited, it may be profitable to revert for a moment to the act of Congress involved

herein. It certainly cannot be said that any specific act is either commanded or forbidden by any language used in this statute. The only thing that is forbidden is a violation of such rules and regulations as may be prescribed by the Secretary of the Interior. But the acts which are to be commanded or forbidden by these rules are not specially described nor are they indeed referred to except in the most general terms. When the statute became a law by the signature of the President there were no rules prescribed and it would have been impossible for a citizen, by any possible analysis of the act, to have determined what were the acts forbidden or commanded and what was the legislative intent which should govern his conduct. Nothing illustrates this better than the line of argument adopted by the late Solicitor-General on page 30 of his brief, where he says: "The regulations do no more than make specific application of the controlling principles fixed by Congress. *They express particulars which the general declaration of the legislature comprehends.* And further on page 38, where he says that "The rule of criminal liability is fixed by Congress; and its *essential factors are* defined by the *legislature.*"

It cannot possibly be said that the forbidding of grazing or the requiring of a permit before grazing, is one of the "essential factors defined by the legislature" in this act of Congress. The very fact that counsel is obliged to resort to this ingenious argument in order to determine what act ,if any, was forbidden or commanded by Congress, in itself condemns the act as being unconstitutional for the reason that it lacks a sufficient definition of a crime.

State v. Mann, 2 *Oregon*, 238, 241.

In the year 1855 the following act was passed by the legislature of the State of Louisiana, by which it was enacted:

> "That whoever shall commit the crime of incest shall, on conviction thereof, suffer imprisonment at hard labor for life."

The first prosecution for incest, under this statute, that found its way to the Supreme Court of Louisiana was in the year 1878.

State vs. Henry Smith, 30 *La., Ann.* 846.

It was there held that the crime of incest, although denounced, *was not defined by any statute of the state,* and, hence, the conviction of the accused man could not stand. Chief Justice Manning, in concluding the opinion of the court, said:

> "We are compelled to discharge the prisoner, and, in doing so, call the attention of the legislative department of the government to the defect in the statute, to the end that it may be speedily remedied. It should declare that inter-marriage or cohabitation between persons within the degrees of consanguinity within which marriage is unlawful constitutes the crime of incest, or such words as are used elsewhere in other criminal statutes, and which have always been held to be necessary for the proper definition and punishment of crimes, which, like this, *vary in meaning* according to the temper or religious notions of different countries."

State vs. Smith, 30 *La. Ann.* 846.
Cook vs. State (*Ind.*) 59 *N. E.* 489.
Augustine v. State. (*Tex*) 52 *S. W.* 80.
State vs. Partlow, 91 *N. C.* 550.
Comm. v. Bank, 3 *Watts & S.* 173.
Drake vs. Drake, 4 *Dev.* 110.

The offense with which the defendant's were charged is that of grazing sheep upon a forest reservation without a permit. Is this crime explicitly defined in the Act of Congress in question? The section of the statute which the Government contends explicitly describes this crime, simply states that the Secretary of the Interior shall make provisions for the protection agaisnt destruction by fire and depredations upon the public forests and forest reservations * * * * * and he may make such rules and regulations and establish such service as will insure the objects of such reservations, * * * * * and that any violation of the provisions of this act or such rules and regulations shall be punished, etc. If the position of the Government in this case be sound then we have the legal anomaly of a law under which indictment can be found for a *thousand* different offenses, no one of which is specified in the statute; for each offense a radically different indictment would have to be found, every one of which would describe a different offense, in different language, and yet each offense must be tried and punished under one and the same section of the statute. We had yet to hear of a criminal statute under which an alleged offender could be convicted and punished for an unlimited number of different offenses, each offense being necessarily described in each indictment in language which would preclude his conviction for any of the different offenses for which he might be indicted under the same section of the statute, no one of the specific acts for which the defendant would be tried and convicted being described and denounced as a crime and where in the statute, the indictment in each case describing totally different acts or omissions, until we

found the statute involved in this case buried in an Act making appropriations for sundry civil expenses of the government.

The language of the late Mr. Justice Brewer, in the case of Tozer vs. United States, is very apposite to the case at bar, in which he said:

> " But in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of Railway Co. v. Dey 35 Fed. Rep. 866, 876, I had occasion to discuss this matter, and I quote therefrom as follows:
>
> " 'Now, the contention of complainant is that the substance of these provisions is that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable rate. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, *for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.* In Dwar. St. 652 it is laid down "that it is impossible to dissent from the doctrine of Lord Coke, that the acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters.' See, also, U. S. v. Sharp, Pet. C. C. 122; The Enterprise, 1 Paine, 34; Bish. St.

Crimes, sec. 41, Lieb.Herm.156. In this the author quotes the law of the Chinese Penal Code, which reads as follows: 'Whoever is guilty of improper conduct, and of such as contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows.' There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate. See another illustration in Ex parte Jackson, 45 Ark. 158."

Tozer v. United States, 52 *Fed. Rep.* 917.
Louisville & Nash. R. R. Co., v. Commonwealth, (*Ky.*) 33 *L. R. A.* 209.

On July 1, 1908, the Secretary of Agriculture promulgated eighty-one rules and regulations, the violation of any one of which is made a crime by this statute. Some of these forest reservation are thousands of miles away from the place whence it is supposed these rules and regulations will emanate. How can any citizen know, from day to day, whether he is a criminal or not? To-day he may be on a forest reserve engaged in doing something that is not a violation of these rules. To-morrow the secretary may change the rules and regulations and forbid the very acts which this man has hitherto done with impunity. This man is then a criminal and liable to severe punishment without any further notice. Counsel for the Government intimate that the *law* can readily be ascertained by referring to these rules and regulations. True, but then the citizen is looking not to an act of Congress defining and punishing as a crime certain acts of omission or commission, but to a law enunciated by an administrative officer.

But before a citizen could possibly obtain the new rule of law—he not making daily visits to the Department of Agriculture—to which he must conform his actions, he might innocently and without any intention of wrong doing, or possibility of knowing he was a wrong-doer, have committed offenses which would result in his being imprisoned fifty years and fined twenty-five thousand dollars; nor is it beyond the bounds of probability that such an offender would be prosecuted by a zealous United States Attorney, and such a punishment inflicted (see O'Neil v. Vermont, 144 U. S. 323), and under the holding of this court in that case he could not urge that such a punishment is cruel and unusual.

Can a limit be set to the enactment of rules and regulations which are, in the language of the Solicitor-General, "fairly and importantly pertinent to the declared congressional objects of protecting and improving the forests?" If not, then there is no limit to the number of different and distinct crimes for which a citizen can be indicted and convicted under this statute, none of which is explicitly described in the statute, and each offense composed of essentially different elements. It is axiomatic that offenses created by statute must be accurately and clearly described in the indictment. Should the court hold that it is sufficient in an indictment under this law to describe the offense in the words of the statute, which is the general rule, would the accused be informed of the nature and cause of the accusation against him? Could a convicted offender, in another prosecution, plead former jeopardy under such an indictment? If the indictment under which he was convicted were framed in the words of the statute, a

conviction for grazing sheep upon a forest reservation without a permit could be successfuly pleaded in bar of a prosecution under the same act for cutting timber on a forest reserve in violation of the all-pervading rules. Here are certainly two separate and different offenses which it is proposed to punish under this act, neither of which are specifically defined in it. We need not stop at two. There can be numberless wholly different offenses against this statute, without any information as to what they consist of, under the construction sought to be placed upon it by the Government.

Should the court hold that the other rule of criminal pleading, which, in framing indictments founded upon statutes, is paramount to all others, that every ingredient of the offense must be accurately and clearly expressed, is applicable to prosecutions under this statute, then it is conclusive that this statute embraces not one but thousands of possible crimes, not defined or described with precision, or at all, in the statute, but which are attempted to be described and defined, not in any statute of the United States, but in the rules and regulations promulgated by an administrative officer of the Government.

We contend that this statute is obnoxious to the rule laid down by Chief Justice Marshall in the case of United States vs. Wiltberger, 5 Wheat. 85, and no stronger argument can be made against the validity of this statute to sustain the prosecution in the case at bar, than the following extract from the opinion of the illustrious father of Federal Jurisprudence in that case:

> "The indictment in this case, is founded on the 12th section of the act, entitled, "an act for the punishment of certain crimes against the

United States." That section is in these words: 'And be it enacted, that if any seaman or other person, shall commit manslaughter on the high seas, or confederate,' &c., ' such person or persons so offending, and being therefore convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars."

"The jurisdiction of the court depends on the place in which the act was committed. Manslaughter is not punishable in the courts of the United States, according to the words which have been cited, unless it be committed on the high seas. Is the place described in the special verdict a part of the high seas?

"If the words be taken according to the common understanding of mankind—if they be taken in their popular and received sense—the "high seas," if not in all instances confined to the ocean which washes a coast, can never extend to a river about half a mile wide, and in the interior of a country. This extended construction of the words, it has been insisted, is still farther opposed by a comparison of the 12th with the 8th section of the act. In the 8th section Congress has shown its attention to the distinction between the "high seas" and a "river haven, basin, or bay." The well known rule that this is a penal statute, and is to be construed strictly, is also urged upon us.

"On the part of the United States, the jurisdiction of the court is sustained, not so much on the extension of the words "high seas" as on that construction of the whole act which would engraft the words of the 8th section, descriptive of the place in which murder may be committed, on the 12th section, which describes the place in which manslaughter may be committed. This

transfer of the words of one section to the other is, it has been contended, in pursuance of the obvious intent of the legislature; and in support of the authority of the court so to do, certain maxims, or rules for the construction of statutes, have been quoted and relied on. It has been said, that although penal laws are to be construed strictly, the intention of the legislature must govern in their construction. That if a case be within the intention, it must be considered as if within the letter of the statutes. So if it be within the reason of the statute.

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

"It is said, that notwithstanding this rule, the intention of the law-maker must govern in the construction of penal, as well as other statutes. This is true. But this not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for

> construction. The case must be a strong one indeed, which would justify the court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as *to punish a crime not enumerated in the statute*, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."
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> *U. S. v. Wiltberger*, 5 *Wheat.* 85, 5 *L. Ed.* 92.

An indictment framed in the general words of this statute would be obnoxious to a demurrer. In order to constitute due process of law under the 6th amendment to the Constitution an indictment must state the nature and cause of the accusation against the accused, thus necessitating that all the essential ingredients of the offense charged comprised within the definition of the crime given by the statute be set forth. These facts and circumstances must be stated with clearness and certainty, otherwise the accused will not be apprised of the particular crime with which he stands charged, and would be unable to prepare his defense and avail himself of his acquittal or conviction against further prosecution for the same cause.

The statute in question does not denounce a punishment against any person who shall destroy or commit

depredations upon a forest reserve. Those acts are not crimes against the United States under the section of the statute on which these prosecutions are based. An indictment charging a citizen with committing depredations upon a forest reserve, and also pleading the specific acts of which the alleged depredations consisted, would not state facts sufficient to constitute a crime against the United States under this particular section; but if in addition thereto it were pleaded in such an indictment that the acts constituting the depredations charged were done contrary to the rules and regulations of the Secretary of Agriculture duly made and promulgated pursuant to this statute, then, if the government's contention in this case is correct, the indictment would not be obnoxious to a demurrer, since the statute only penalizes a violation of the rules and regulations to be thereafter promulgated by the Secretary. It is thus patent that it is not a law passed by the Congress of the United States that the defendants in these cases are charged with violating, but a law enacted solely by an administrative officer of the Government.

It would not be enough to charge in general terms that the defendant had violated the rules and regulations of the Secretary of Agriculture, without descending to particulars and giving a description of the acts constituting the offense, as the defendant would be utterly at loss to know which rule or regulation he is charged with violating, and he could not possibly come to court prepared to meet a charge of violating any one of the regulations promulgated that the prosecutor might choose to try him on. Does not this fact conclusively establish that the statute in question is void

for uncertainty, since under its operation and the requirements of due process of law laid down by the Constitution, every violation of each rule constitutes a different and distinct crime? Congress itself would be powerless to authorize a conviction of an offender under an indictment framed in the general terms used in this statute, as such a loose form of accusation would allow of the trial of a multitude of offenses under an inaccurate description of one. If due process of law as guaranteed by the 6th amendment demands in an indictment a specific description of the offense charged, much more so does it demand that the statute under which the indictment is found should clearly state the specific acts or omissions that shall constitute a crime against the United States.

In the case of Sarlls vs. United States, 152 U. S. 570, this court held that lager beer was not within the meaning of a statute prohibiting the introduction into the Indian country of "Spirituous liquors," even though beer is a fermented liquor, contains alcohol, is intoxicating, and was within the supposed mischief intended to be corrected by the statutes; that such a statute being penal, could not be construed so broadly as to include beer within its terms; and the judgment of conviction in the lower court was reversed and the defendant discharged. In commenting upon the case of State vs. Giersch, and other cases supporting the contrary lines of authorities, the reasoning and conclusion wherein had been adopted by the United States District Court of Arkansas in sustaining the conviction and sentence, below, Mr. Justice Shiras said:

> "To the contrary of these definitions and decisions, the principal case is that of State vs.

Giersch, 98 N. C. 720, the reasoning and conclusion wherein were adopted by the court below. That was a case where a statute of North Carolina prohibited the introduction and sale of spirituous liquors, and the court held those terms to be generic, and to include all intoxicating liquors containing alcohol, whether distilled, fermented, or vinous.

"The reasoning on which such a conclusion is reached excludes the common and popular signification of the words, and finds the meaning of the statute in the fact, true in a scientific sense, that alcohol is found in fermented, as well as distilled liquors, and that the purpose of the statute is to prevent the mischief occasioned by the use of intoxicating drinks.

"We cannot agree with this method of reading a penal statute. The purpose of such a statute is to notify the public of the legislative intent, not to furnish scientific definitions. That intent is, in most cases, to be found by giving to the words the meaning in which they are used in ordinary speech.

"Nor can courts, in construing penal statutes, safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such statutes, *because of a supposed public policy or purpose.*"

Sarlls vs. United States, 152 *U. S.* 570.
Todd vs. United States, 158 *U. S.* 278.

In the case of the United States vs. Reese, 2 Otto, 241, this court held that a penal statute must be construed strictly. That this court cannot introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. It

seems to us that the opinion of Mr. Justice Waite in that case, from which we quote largely below, should effectually dispose of the Government's contention in this case, that the statute under consideration here can be so construed, not only by the court, but by the Secretary of Agriculture, as to make a crime of any act which he shall deem a destruction of, or depredation on, a Forest Reserve. It is the very essence of the Government's contention here that the very general language used in the statute under consideration can be, by construction of the Secretary and the court, made to include any number of widely different specific offenses. The answer to this is found in the following quotation from the opinion of Mr. Justice Waite in the case of the United States vs. Reese, supra, as follows:

> " A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. If this statute limits the wrongful act which will justify the affidavit to discrimination on account of race, etc., then a citizen who makes an affidavit that he has been wrongfully prevented by the officer, which is true in the ordinary sense of that term, subjects himself to indictment and trial, if not to conviction, because it is not true that he has been prevented by such a wrongful act as the statute contemplated; and if there is no such limitation, but any wrongful act of exclusion will justify the affidavit and give the right to vote without the actual performance of the prerequisite, then the inspector who rejects the vote because he reads the law in its limited sense and thinks it is confined to a

wrongful discrimination on account of race, etc., subjects himself to prosecution, if not to punishment, because he has misconstrued the law. Penal statutes ought not to be expressed in language so uncertain. If the Legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. *Every man should be able to know with certainty when he is committing a crime.*" * * * * * * *

"We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. *The proposed effect is not to be attained by striking out or disregarding words that are in the section, but* by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. *The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when as expressed, it is general only.*"

"*It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the court*

to step inside and say who could be rightfully detained and who should be set at large.. This would, to some extent, substitute the Judicial for the Legislative Department, of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people."

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

"We must, therefore, decide that Congress has not as yet provided by "appropriate legislation" for the punishment of the offense charged in the indictment; and that the circuit court properly sustained the demurrers and gave judgment for the defendants."

U. S. vs. Reese, 2 *Otto*, 214-256, 23 *L. Ed.* 563.

IN RE KOLLOCK AND THE UNION BRIDGE CASE

In view of the prominence given by the Solicitor-General to the decisions of this court in the cases of In Re Kollock, 165 U. S., 526, Union Bridge Co. vs. United States, and Buttfield vs. Stranahan, 192 United States, 470, 492, we felt it incumbent upon us to distinguish those cases from the case at bar. A careful examination of them will show that they differ radically from this; not only as to the statutory provisions

construed but also in the line of reasoning used by the court. In United States vs. Hudson, 7 Cranch, 32, this court has said: "The legislative authority of the Union must first make *an act* a crime, affix the punishment to it, and declare the court that shall have jurisdiction of the offense." In order for an act of Congress to comply with the above rule laid down by this court, the Act itself must specifically define what act or acts the commission or omission of which will constitute a crime against the Government. This rule was complied with in the Oleomargarine Act construed in the Kollock case, and in the River and Harbor Act, on which the prosecution of the Union Bridge Co. case was based.

In the Kollock case the defendant was indicted under section 6 of the act of Congress, approved August 2, 1886, (24 St. at L. 209, Chap. 840) entitled "An Act Defining Butter, and also Imposing a Tax upon and Regulating the Manufacture, Sale, Importation and Exportation of Oleomargarine." Section 6, of that act, among other things, provided:

> "Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceding 10 pounds and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. *Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to*

> law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than $1,000 and be imprisoned not more than two years."

It will thus be seen that the statute under which Kollock was indicted and convicted, and the conviction sustained by this court, definitely prescribed the act or acts which should constitute the offense. The most careful examination will fail to reveal any such certain definition of the acts which shall constitute the offense for which the defendants in the cases at bar are prosecuted, in the act of Congress conferring upon the Secretary of the Interior the right to prescribe a rule or regulation, for the infraction of which fine and imprisonment are denounced upon the offender. It was urged by Kollock that the statute above quoted was invalid because it did not "define what act done or omitted to be done shall constitute a criminal offense," "and delegates the power" to determine what acts shall be criminal, "by leaving the stamps, marks and brands to be determined by the Commissioner." In overruling this contention and upholding the statute, Mr. Justice Fuller, delivering the opinion of the court, said:

> "We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution. *But here the law requires the packages to be marked and branded; prohibited the sale of packages that were not;* and prescribed the punishment for sales in violation of its provisions; while the regulations simply describe the particular marks, stamps,

and brands to be used. *The criminal offense is fully and completely defined by the act* and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail. The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offense. We think the act not open to the objection urged, and that it is disposed of by previous decisions."

"* * * * We concur with the court of appeals that this provision does not differ in prinicple from those of the internal revenue laws, which direct the Commissioner of Internal Revenue to prepare suitable stamps to be used on packages of cigars, tobacco, and spirits; to change such stamps when deemed expedient; and to devise and regulate the means for affixing them. Rev. Stat ++ 3312, 3395, 3445, 3446, etc.

"* * * And we are of opinion that leaving the matter of designating the marks, brands, and stamps to the Commissioner, with the approval of the Secretary, involved no unconstitutional delegation of power."

After a close scrutiny of the statute under which Kollock was indicted, and the opinion of Mr. Chief Justice Fuller in that case, we feel justified in saying that instead of the Kollock case being a decision upholding the Government's contention in the cases at bar, it is directly the contrary, and sustains rather the position taken by the defendants in error herein.

The case of Union Bridge Co. vs. United States, 204 U. S. 364, was a prosecution based on Section 18 of the

River and Harbor Act of March 3, 1899, which provides:

> "That when the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States, is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width or span, or otherwise, or where there is difficulty in passing the draw opening or draw span of such bridge by rafts, steamboats or other water crafts, it shall be the duty of said secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge, so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed * * * * * * * * if the persons, corporation or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War, in the premises, such persons, corporation or association shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding five thousand dollars: * * *"

This statute, it will be seen, fully defines the acts that shall constitute the crime, and affixes the punishment, and is, therefore complete in itself. Any person, corporation or association can know from a perusal of the statute what acts will constitute a crime against the United States. But the statute allows a locus pot-

ential by providing that when the Secretary of War has ascertained the fact he shall notify the offender, and however guilty the offender may be, he can still retreat and escape the consequences of his unlawful act by complying with the Secretary's order. Furthermore, the statute does, in substance and effect, though not in terms, make the finding of the Secretary of War that the bridge is an unreasonable obstruction to free navigation conclusive evidence of that fact. But even in establishing a special rule of evidence in that class of cases, the Act does not proceed arbitrarily and give to the Secretary of War full power and discretion to declare *any bridge* an obstruction to free navigation; he must proceed upon notice and evidence, and his order only becomes a conclusive rule of evidence after due notice and hearing has been given to the offender. The statute specifically says that "*if any railroad or other bridge * * * * * * is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width or span or otherwise, or where there is difficulty in passing the draw opening or draw span of such bridge by rafts, steamboats or other water craft, * * * * *"* its continued maintenance, or failure to comply with the *lawful order* of the Secretary of War, after due notice has been given and a hearing had, shall constitute an offense and be punished accordingly. This falls far short of a grant of power to an administrative officer to make such rules and regulations as he shall deem necessary, which shall have the force and effect of law, and become, *ipso facto*, criminal laws, immediately upon their promulgation. On the contrary, the administrative officer is to *ascertain a fact* which when ascertained shall be effected by

the law. This is clearly the ground upon which the decision is based, and is said to be in harmony with the former decisions of this court. Further, in the opinion of Mr. Justice Harlan, this court also bases its decision in that case partly upon the ground that the Secretary of War could not act thereunder without first giving notice to the parties offending and an opportunity to be heard; that the notice was duly given to all parties concerned, and they were fully heard; and that the Secretary of War was entirely "justified, if not compelled by the evidence, in finding that the bridge in question was an unreasonable obstruction to commerce."

The case of Buttfield vs. Stranahan, 192 U. S. 470, 492, is sufficiently distinguished from the cases at bar by the simple statement that it was not a criminal proceeding, but an action to recover damages for the alleged wrongful seizure, removal and destruction of certain tea that had been seized by the collector of the port of New York, pursuant to the Act of Congress of March 2, 1897, entitled "An Act to Prevent the Importation of Impure and Unwholesome Tea, etc." (29 Stat. at L. 604, Chap. 538, U. S. Comp. Stat. 1901, p. 3194), which is an act authorizing the seizure and destruction of the property of tea importers who should, in violation of its provisions, import or bring into the United States any merchandise as tea which is inferior in purity, quality and fitness for consumption to the standards provided in Section 3 of the Act, and importation of all such teas is prohibited; and by the following excerpt from the opinion of this court delivered by Mr. Justice White in that case:

"The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the court of appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of Marshall Field & Co. vs. Clark, 143 U. S. 649, 36 L. Ed. 294, 12 Sup. Ct. Rep. 495, where it was decided that the 3rd section of the tariff act of October 1, 1890 (26 Stat. at L. 567, chap. 1244), was not repugnant to the Constitution as conferring legislative and treaty-making power on the President, because it auauthorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides. We may say of the legislation in this case, as was said of the legislation considered in Marshall Field & Co. vs. Clark, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate

foreign commerce could not be efficaciously exerted."

Buttfield vs. Stranahan, 192 *U. S.* 470, 492.

Caha vs. United States, 152 U. S. 211, also relied upon by the Solicitor-General, was a prosecution for perjury under Section 5392, U. S. Rev. Stat., and the following quotations from the opinion of Mr. Justice Brewer, show that it is not an authority supporting the contention of the Government in this case, this court saying:

"This is not a case in which *the violation of a mere regulation of a department is adjudged a crime.*" * * * * * *

"This perjury was not merely a wrong against that tribunal or a violation of its rules and requirement; the tribunal and the contest only furnished the opportunity and the occasion for the crime, *which was a crime defined in and denounced by the statute.*" and further, after quoting from the case of United States vs. Eaton, Supra, the learned justice continues:

"This, it will be observed, is very different from the case at bar, *where no violation is charged of any regulation made by the department.* All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, *at which the defendant committed perjury in violation* of Section 5392."

Caha vs. U. S. 152 *U. S.* 211.

We feel constrained to take issue with the late Solicitor-General on the statement made on page 36 of his able brief, wherein he states that "In the Bailey case a

conviction of perjury was sustained when the false oath was taken before an officer whom a treasury regulation alone authorized to administer the oath." This statement refers to the case of United States vs. Bailey, 9 Peters, 239, which is one of the four cases relied upon by the Government to sustain its position (the other three being the Kollock case, Union Bridge case and U. S. vs. Caha, already discussed) that the rule promulgated by the Secretary of Agriculture forbidding the grazing of sheep on a Forest Reserve is one of the thousands of valid administrative orders to which a criminal sanction can be attached by the Act of Congress of June 4, 1897. The Bailey case was not a conviction of perjury. It was a conviction for false swearing to a claim against the United States under the Act of Congress of March 1, 1823, but the punishment denounced by that statute against false swearing is the same as for wilful and corrupt perjury. The defendant Bailey in that case was not convicted of perjury, but of the new and substantive offense of false swearing, created by the statute. He had taken an oath before a justice of the peace of the State of Kentucky, an officer authorized to administer oaths, that a certain claim against the United States was true, when in fact it was false. That claim, attested by the oath of the claimant, was presented to the Secretary of the Treasury, who was authorized to pass upon the validity of such claims, who had made a rule or acted upon a custom or usage (from the report of the case it is uncertain which), of considering, and allowing or disallowing such claims when they were supported by an oath taken before any officer competent to administer an ordinary oath by virtue of his office. It was contended by the defendant in the

Bailey case that as Congress had not authorized any State officer to administer oaths to claimants under the Act of Congress of July 5, 1832,—the act under which the claim was being made,—therefore, in analogy to the crime of perjury, there could be no crime of false swearing, even though the justice who administered the oath, was, by virtue of his official character, competent to administer an oath. This contention found no favor with the court, they holding, speaking through Mr. Justice Story, that having taken an oath before an officer having an admitted authority under the State laws to administer an oath, *virtute officii*, and having presented to the Secretary and had considered his claim supported by such false oath, that it was clearly within the provisions of the Act of March 1, 1823, defining false swearing, and affixing to it the punishment denounced against perjury. We quote below from Mr. Justice Story's opinion, showing the true ground on which the conviction was sustained, and that the question there involved and decided was not the case of a statute conferring power upon an administrative officer to make such rules and regulations as he might deem fit and proper, and punishing as a crime any violations of the rules and regulations that might so be promulgated, without in any manner defining in the statute itself the act or acts to which the penal sanction is attached. In the Bailey case the statute fully defined the crime as well as affixed the punishment, and it was held not to be analogous to the crime of perjury, and that the crime of false swearing under that statute could be committed by taking a false oath before a State officer competent to administer an ordinary oath

by virtue of his office, as is shown by the following quotation from the opinion of the court:

> "Admitting, for the sake of argument, that it is true (on which, however, we express no opinion) that a State magistrate is not compellable to administer an oath, *virtute officii*, under a law of the United States which expressly confers power on him for that purpose, still, if he should choose to administer an oath under such a law, there can be no doubt that it would be a lawful oath by one having competent authority, and as much so as if he had been specially appointed a commissioner under a law of the United States for that purpose. And we think that such an oath administered under such circumstances, would clearly be within the provision of the Act of 1823. That act does not create or punish the crime of perjury, technically considered. But it creates a new and substantive offense of false swearing, and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case of which the State magistrate, under the laws, had judicial jurisdiction, so as to make the false swearing perjury. It would be sufficient that it might be lawfully administered by the magistrate, and was not in violation of his official duty."

> "There being no express authority given by any law of the United States to any State magistrate to administer an oath in the present case, the next inquiry naturally presented is, whether the Secretary of the Treasury had an implied power to require, authorize, allow or admit any affidavits sworn before State magistrates, in proof or in support of any claim under the Act of 1832; for if he had, it would be very difficult

to show that such an affidavit is not within the true intent and meaning of the Act of 1823, as it certainly is within the very words of the enactment. The policy of the act clearly extends to such a case; and the public mischief to be remedied is precisely the same as if the affidavit had been taken under the express and direct authority of a statute of the United States."

United States vs. Bailey, 9 *Peters*, 239.

In the able and exhaustive opinion of Judge Welborn the law applicable to this case was fully discussed, and we cannot close this subdivision of our brief any better than with the following quotation from his opinion on this branch of the case:

"There can be no pretense that Congress itself has defined as a crime the act for which defendants are here indicted, namely, grazing sheep, without permission, in a forest reserve. The statute itself does not forbid or make any reference whatever to sheep grazing, nor in the remotest degree suggest that Congress had it at all in mind, and, according to the Government's own theory, it did not become a crime until nine years after the passage of the statute, which the government claims made it criminal, and then only because of the promulgation of an administrative rule which it contravenes. The mere statement of the theory, it seems to me, condemns it, and, after much reflection, I have now no hesitancy in holding that the statute, in so far as it affixes punishment to infractions of executive rules and regulations thereafter to be promulgated, is incomplete and wholly inadequate to form the basis of a criminal prosecution."

United States vs. Grimaud, 170 *Fed Rep.* 207.

II.

That the law under which the indictments were found is in violation of the Constitution and laws of the United States, for the reason that it is not within the power of Congress under the Constitution of the United States to delegate to the Secretary of the Interior or the Secretary of Agriculture of the United States, or any other person, authority or power to determine what acts shall be criminal, and the act in question is a delegation of legislative power to an executive officer to define and establish what shall be the essential elements of a crime against the United States.

U. S. vs. Mathews, 146 *Fed. Rep.* 306.
U. S. vs. Maid, 116 *Fed Rep.* 650.
U. S. vs. Blasingame, 116 *Fed Rep.* 654.
U. S. vs. Eaton, 144 *U. S.* 677, 36 *L. Ed.* 594.
U. S. vs. Keokuk, & H. Bridge Co. 45 *Fed. Rep.* 178.
U. S. vs. Rider, 50 *Fed. Rep.* 106.
O'Niel vs. American Fire Ins. Co. 166 *Pa.* 72, 30 *Atl.* 943.
State, ex rel. Adams vs. Burdge, 95 *Wis.* 390, 37 *L. R. A.* 157.
Dowling vs. Lancashire Ins. Co. 92 *Wis.* 63, 65 *N. W.* 741.
Anderson vs. Manchester Fire Ins. Co. 59 *Minn.* 182, 28 *L. R. A.* 609.
Ex parte Cox, 63 *Cal* 21.
Harbor Com'r. vs. Excelsior Redwood Co. 88 *Cal.* 491.
Schaezlein vs. Cabaniss, 135 *Cal.* 466.
Kilbourn vs. Thompson, 103 *U. S.* 168-191, 26 *L. Ed.* 378.

Our second contention, briefly summarized, is that the Act of Congress of June 4, 1897, is a delegation of legislative power to an administrative officer in that it leaves to his discretion the defining of acts that shall constitute a crime against the United States, and grants to him power and authority to make, alter and repeal a portion of the criminal laws of the United States at his pleasure, without the advice, knowledge or consideration of Congress, since under the Government's theory of the case the rules and regulations when promulgated by the Secretary have the force and effect of criminal laws. We do not dispute the proposition that an act of Congress complete in all its parts, can be called into operation, or its operation suspended by the happening of a contingent event, the fact of the happening of such contingent event to be ascertained by an executive officer, and when such fact is ascertained, such law can be suspended, or brought into operation, by the act of the executive officer proclaiming that event. This is a mere ministerial duty, granting no power to legislate, and leaving nothing to the discretion of the executive or administrative officer beyond the ascertaining of the fact or contingency upon the happening of which the suspension or operation of the law is made by its own terms to depend. This principle was enunciated and acted upon by this court in construing the Act of Congress of October 1, 1890, in the case of Field vs. Clark, 143 U. S. 694. That principle, however does not touch this case.

The statute in question in this case contains none of the essential constituent elements of a criminal law. Its language is that any violation of the rules and regulations of the Secretary shall be punished as a crime.

This language, in a criminal statute, which must particularly define the act or acts which it attempts to denounce, and attach to them a penal sanction, is pointless. It does not attempt to define the act or acts which shall constitute a crime, and does not in terms prohibit any specific act, but leaves to the discretion of the Secretary of Agriculture to define the essential elements of a criminal statute the violation of which shall be an offense against the United States. It is true that it does attempt to make the violation of any future law, which may thereafter be decreed by the wisdom of the Secretary, a crime and punish it as such. What is a law? Is it not, in the language of Blackstone, a rule prescribed by the legislature, uniform, universal and permanent in its operation; not a transient, sudden order from an administrative officer to or concerning a particular person or thing. Under this statute, as construed by counsel for the government, the Secretary's orders have the force and effect of administrative decrees, as insidious in their origin, and as pernicious in their effects, as the rescripts of a Roman Emperor, who, under the despotism of the civil law, combined in his own person the legislative, executive and judicial powers of the Roman world.

The validity of this act of June 4, 1897, has come up before the Federal Courts in several cases. It was before the District Court for the Southern District of California in the case of U. S. vs. Blasingame, 116 Fed. Rep. 654, wherein Judge Wellborn held that the act "in so far as it declares to be a crime any violation of the rules and regulations thereafter to be made by the Secretary of the Interior for the protection of the forest reservation, is, in substance and effect, a delegation of legisla-

tive power to an administrative officer." It was again construed in Dastervignes vs. U. S., 122 Fed. Rep. 30, wherein the Circuit Court of Appeals, Ninth Circuit, in a suit praying for an injunction to restrain trespassing, held that the right to make rules to regulate the occupancy and use of forest reservations "And to proserve the forests thereon from destruction, "did not involve the delegation of legislative power as applied to the property of the government, but, on the contrary, the making of such rules was a proper exercise of administrative authority. Its validity was once more construed in U. S. vs. Mathews 146 Fed. Rep. 306, wherein the regulation, as defining a crime, was held by District Judge Whitson to be an unlawful delegation of legislative power.

The legislative power of the United States is vested alone in Congress, and that power cannot be delegated by that body to an officer of any other branch of the government. This is a principle so well established that citation of authority is unnecessary. The only question to be considered in any particular case is whether or not the particular power delegated is legislative.

It will be observed from the above cases that there have been opposite constructions of this statute, the one upholding it as a proper delegation of legislative powers. If these two lines of cases can both be upheld in principle then we have a delegation of power which is valid for certain purposes, but invalid for others. That is, the power to make rules and regulations may be valid when exercised in the civil administration of law, and at the same time invalid as the definition of

crime. An examination of the cases will show that these two constructions are not inconsistent, but they are upheld by both precedent and principle. In the case of Stratton vs. Oceanic S. S. Co., 140 Fed. Rep. 829, 830, the same court which decided Dastervignes vs. U. S., supra, said:

"The law is well settled that the legislative power of the United States is vested in Congress, and that Congress has no authority to delegate that power to any administrative officer, but Congress has the power to authorize any of its administrative officers to make such rules and regulations as may be deemed necessary to enforce the provisions of the law. The true distinction in all such cases is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the second, no valid objection can be made."

Judge Wellborn in U. S. vs. Maid, infra, expressed these sentiments:

> "A department regulation may have the force of law in a civil suit to determine property rights, as in Cosmos Exploration Co. vs. Gray Eagle Oil Co., supra, and yet be ineffectual as the basis of a criminal prosecution. * * * The obvious ground of distinction is that to make an act a criminal offense is essentially an exercise of legislative power, which cannot be delegated, while the prescribing by the President or head of a department, thereunto duly authorized, of a rule, without penal sanctions, to carry into effect what Congress has enacted, although

such rule may be as efficacious and binding as though it were a public law, is not a legislative, but ministerial function."

On this point see also quotation below from U. S. vs. Eaton.

The power of an administrative officer to make rules for the proper carrying out and enforcing a law is said to be absolutely necessary, and the cases are numerous in both state and Federal courts where the delegation of such power has been held not to be a violation of the principle that legislative power cannot be delegated. But the cases wherein the effect of the rule has been to make the violation of such rule a criminal offense are few. Among those upholding the exercise of the power as lawful are: United States vs. Breen 40 Fed. Rep. 402, and United States vs. Ormsbee, 74 Fed. Rep. 207, wherein statutes authorizing the Secretary of War to prescribe rules governing the use of navigable waters and making a violation of them a misdemeanor were sustained.

Among the cases denying the exercise of such power, are:

U. S. vs. Eaton, 144 *U. S.* 677, 36, *L. Ed.* 594.
U. S. vs. Keokuk & H. Bridge Co. 45 *Fed. Rep.* 178.
U. S. vs. Rider, 50 *Fed. Rep.* 106.
U. S. vs. Maid, 116 *Fed. Rep.* 650.
U. S. vs. Blasingame, 116 *Fed. Rep.* 654.
U. S. vs. Mathews, 146 *Fed. Rep.* 306.
Ex parte Cox, 63 *Cal.* 21.
Harbor Com'r. vs. Excelsior Redwood Co. 88 *Cal.* 491.
Schaezlein vs. Cabaniss, 135 *Cal.* 466.

The case of U. S. vs. Eaton is the only one where such a statute has come before the Supreme Court, and while the language of the act therein construed was not so broad as in this one relating to the forest reserve, yet, in the opinion rendered, this court seems to have clearly defined its position. In holding that a sufficient statutory authority should exist for declaring any act or omission a criminal offense the court laid down this doctrine:

> "Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violatoin of a public law, either forbidding or commanding it.' Am. & Eng. Enc. Law, 642; 4 Bl. Com. 5.
>
> "It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the Oleomargarine Act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of a business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under Sec. 18 of the Act; particularly when the same Act, in Sec. 5, requires a manufacturer of the Article to keep such books and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require and does not impose, in the section or elsewhere in the Act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article.

> "It is necessary that a sufficient statutory authority should exist for declaring any Act or omission a criminal offense, and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in Sec. 41 of the Act of October 1, 1890.
>
> "Regulations prescribed by the president and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

The Supreme Court of California has had occasion to pass on this question a number of times.

The case of Ex parte Cox, 63 Cal. 21, was a petition for writ of habeas corpus. The petitioner had been convicted of a misdemeanor, consisting of the violation of a rule and regulation of the Board of State Viticultural Commissioners, and sued out a writ of habeas corpus which was granted, and the petitioner discharged. The powers attempted to be exercised by the officers and commissioners were specified in the Act of March 4, 1871, passed by the legislature of California. In that case the court held:

"The act declares that the officer shall have power subject to the approval of the board, to declare and enforce rules and regulations in the nature of quarantine, to govern the manner of, and restrain or prohibit the importation into the State and the distribution and disposal within the State, of infected vines, cuttings, and empty fruit boxes, etc.; the act also declares that a wilful violation of the quarantine regulations of the board shall be a misdemeanor.

"For the purpose of local legislation, legislative functions may be conferred upon and exercised by municipal corporations; but the act before us is in no sense a conferring of powers for municipal purposes. The legislature had not authority to confer upon the officer or board the power of declaring what acts should constitute a misdemeanor. The legislative power of the State is vested in the Senate and Assembly. (Const. Art. IV, Sec. 1.) That power could not, as to the case before us, be delegated to the officer or board. The act before us does not say it shall be unlawful to import, distribute, or dispose of infected articles, but it attempts to confer upon the officer and board the power to so declare."

This case was followed in Harbor Com'rs vs. Excelsior Redwood Co., 88 Cal. 419, and Schaezlein vs. Cabaniss, 135 Cal. 466.

Perhaps no clearer or more forcible statement of the point can be found than in the closing paragraph of the opinion of Judge Whitson in U. S. vs. Mathews, supra:

"This case does not fall within the rule so well explained and amplified by the authorities that the executive branch of the government may make proper rules and regulations for carrying

into effect the legislative will of Congress. The President may be authorized to declare by proclamation that a law shall go into effect upon the happening of a certain contingency. The Secretary of the Treasury may make rules and regulaitons for the enforcement of the revenue statutes and the like. So may the heads of all the departments make like regulations, but the authority to do so must be expressly delegated, and the law must be complete in itself. The rules and regulations may only be prescribed for carrying out what congress has expressly declared to be the law. Such powers do not pertain to the legislative functions, but are referable to administrative duties. Congress cannot leave a statute to be enlarged upon either by the courts or the executive department. It cannot authorize any other branch of the government to define that which is purely legislative, and that is purely legislative which defines rights, permits things to be done or prohibits the doing thereof. Certainly here, it is the Secretary of Agriculture who has undertaken to enact this law. He it is who has designated that which constituted the crime. The thing prohibited, the thing for which the party is to be punished, the act which is the offense, is prescribed by the Secretary and not by Congress. As we have seen this cannot be done.'

From these cases it must be admitted the rule is well established that an administrative officer cannot be clothed with the power of prescribing what shall constitute a crime.

The principle supporting all of these cases is that legislative power is vested in Congress alone, and that power cannot be delegated to any agency whatsoever. The rule would apply equally as well were the person to

whom delegated a member or part of the legislative branch. The function of making laws has been by the people entrusted to Congress as a body and that body cannot violate the trust by delegating such power to another. That principle alone is sufficient ground for holding the act here in question invalid for the purposes of this case. But there is another principle which may be invoked in support of the doctrine which has not been emphasized in any of these cases, and that is the danger which must necessarily follow if such practice be permitted. We refer to the danger of vesting in the same agent the power of making and also of executing the laws.

A reference to the words of some of the ablest statesmen who participated in the framing of our constitution and in starting the machinery of our government will show that it was with a view of avoiding such danger, that they, in their wisdom, contrived a separation of governmental functions into three grand departments and forbade each to entrench upon the powers of the others.

This analysis of Government into three parts is as old as Aristotle. In his Politics, he says that in every state there are three divisions; the general assembly deliberating upon public affairs, a body of magistrates, and a judiciary. But Montesquieu, the great French jurist, whose teachings were devoured by our forefathers in their struggle for liberty, "was the first to demonstrate that the separation of governmental powers is indispensable to civil liberty. He was the first to introduce the theory of the separation of governmental powers as a fundamental principle of our modern poli-

tical science." (Bondy in Separation of Governmental Powers, Columbia College Studies in Political Science. Vol. V No. 2, p. 12, 13.) "When the legislative and executive powers are united in the same person or body," says Montesquieu, "there can be no liberty, because apprehensions might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Blackstone says:

> "Whenever the right of making and enforcing the law is vested in the same man or one and the same body of men there can be no public liberty. The magistrate may enact tyrranical laws and execute them in a tyrranical manner, since he is possessed, in his quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself." I. Com. 146.

These teachings were adopted by our forefathers with perfect unanimity. In his farewell address Washington says: "The spirit of encroachment tends to consolidate the powers of all departments in one, and thus to create, whatever the form of government, a real despotism." James Madison in Federalist No. XLVII says: "The accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, a few, or many, whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." In this maxim Thomas Jefferson thoroughly concurred. In his notes on Virginia, page 195, he says: "The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be

as oppressive as one." John Adams said: "It is by balancing each of these three powers against the other two, that the efforts in human nature toward tyranny can alone be checked and restrained and any degree of freedom preserved." While this court is not obliged to follow these sentiments in construing the constitution, yet the "statements above quoted are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the constitution itself." U. S. vs. Wong Kem Ark. 169 U. S. 699. In modern times Webster wrote: "The separation of the departments so far as practicable, and the preservation of clear lines between them, is the fundamental idea in the creation of all our constitutions, and doubtless the continuance of regulated liberty depends on maintaining these boundaries." Justice Miller in commenting on the Constitution in Kilbourn vs. Thompson, 103 U. S., 188, said:

> "It is believed to be one of the chief merits of the American system of written constitutional law that all powers entrusted to governments, whether state or national, are divided into the three grand departments, the executive, the legislative and the judicial; that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of the system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department,

and no others. To these general propositions there are in the Constitution of the United States some important exceptions. * * * * In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary Articles, the allotment of power to the executive, the legislative, and the judicial department of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.

"It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachment upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptation to those to whom that exercise is entrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not entrusted to either of them."

One cannot hear the voices of these great founders echoing down through the history of our republic without being impressed with the belief that they never intended that Congress, the creature of their work, should violate those principles by vesting in the same person the power of promulgating and also of executing a law.

If such is not the letter of our Constitution, it must be the spirit. Yet that is precisely what Congress has here attempted to do. Congress does not say that stock shall not trespass on the forest reserve. It does not say that "all persons must secure permits before grazing any stock." It does not say that to do or not to do any specific fixed thing shall constitute a crime. But it is the Secretary of Agriculture, the one whose duty it is to administer and execute the law, that does all these things. The rule which constitutes the alleged offense is the fiat of a subordinate administrative and appointive officer. His fiat may be one thing today, another tomorrow. Its stability depends upon the tenure of the office or the caprice of the man.

III.

The worst fallacy which counsel for the government commits is when he attempts to uphold the statute on the ground that the government, in dealing with forest reserves, is acting not only in its sovereign capacity, but as a landed proprietor. We are surprised indeed that resort should have been made to this line of argument for neither is the statement of the legal principle correct nor do the authorities cited support such principle. It is urged that the acts of the defendants which constitute the basis of the offense charged, independent of any such statute or rule, involve an interference with the property of the government, constitute a trespass, are a wrong, and no legislation was necessary to make the prohibited act a crime.

It is surprising that counsel for the government should have seriously argued for a moment that this

landed proprietor theory authorized the government to prosecute any act which has not been made a crime by statutory enactment, for it has been a well settled rule of law almost from the foundation of the government that there are no common law offenses against the United States.

U. S. vs. Britton, 108, *U. S.* 199, 27 *L. Ed.* 698.
U. S. vs. Hudson, 7 *Cranch* 32, 3 *L. Ed.* 259.

We do not deny that the government, as a landed proprietor, has the right to bring a *civil action* for trespasses on its domain, and also to abate nuisances, independent of any statuory provision. Such was the case of Camfield vs. United States, 167 U. S., 518, which was an action for the removal and abatement of a fence on the public domain, and we have searched the opinion of the court in that case in rendering its decision and the statutes referred to in vain to find any reference to any criminal liability.

The late Solicitor-General in the last paragraph of his brief uses the following language: "The act of Congress, in the view now presented, means the same as if it read: 'It shall be a crime to enter upon or use forest lands of the United States *after refusal of the consent* of the Secretary of Agriculture.' " This statement conclusively shows the error of the government's position in this case. Counsel desires this court to construe the act as meaning something which cannot, by any stretching of the rules of statutory interpretation, be construed to be within either the letter or spirit of the statute. Had Congress in passing the statute used the words which counsel for the government has suggested, then a very different state of affairs would

have been presented. In an indictment founded on such a law as that which the Solicitor-General suggests the present act means, it would have been necessary to allege and prove the affirmative refusal of the consent of the Secretary of Agriculture to enter upon and use forest lands, and no crime could have been predicated upon the accidental straying of a sheep herder with a band of sheep upon a forest reserve, an act that only violates a set of rules and regulations promulgated by the Secretary, carried around in the pockets of forest supervisors, which does not become a part of the statute in fact, is not recorded in the statutes of the United States, and no trace of which can be found in the records of either branch of Congress. Were the statute worded as it is proposed in the brief of the Solicitor-General to have it construed, it would then certainly define *one crime, and only one,* against the United States; it would not be open to the objections urged against it in this brief, and the penal code of the United States would not have annexed to it a chapter of criminal laws, the fiat of an administrative officer, never passed by, or brought to the attention of, the Congress of the United States.

No better illustration of this may be had than by a reference to the different rules promulgated by the Secretary under this act. On December 1, 1905, regulations were made, "and established to take effect January 1, 1906, and all previous regulations in conflict with the same are hereby repealed." On June 11, 1906, another set of regulations were made "and established to take effect July 1, 1906, and all previous regulations in conflict with them are hereby revoked." On June 1, 1908, another set of regulations were made and pro-

mulgated and "hereby approved, to take effect July 1, 1908, and all previous regulations in conflict with them are hereby revoked." Strange to say this very regulation 45 as promulgated on June 11, 1906, differs from regulation 9 as made on December 1, 1905, and is altogether different from the last regulation on this subject numbered 48 made on June 1, 1908.

A regulation subject to such changes is not, a "rule of action prescribed by a superior which an inferior is bound to obey" or "a rule of civil conduct prescribed by the supreme power in a state," which have been the conception of legal minds as proper definitions of law.

We submit that the Act of Congress approved June 4, 1897, does not in its terms sufficiently define the essential constituent elements of a crime against the United States; that it does delegate to the Secretary of Agriculture the legislative power to enact, repeal, and amend a criminal law of the United States; that such a delegation of power is subversive of the fundamental rights of citizens of the United States, deprives them of their liberty and property without due process of law, and strikes at the very foundations of a republican form of government. The demurrers to the indictments should be sustained, and the judgment of the District Court of California in all things affirmed.

Respectfully submitted,

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